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No. 2155

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN FIVE VOLUMES)

EBNER GOLD MINING COMPANY (a Corporation),
Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant in Error.

VOLUME V.
(Pages 1513 to 1895, Inclusive.)

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

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(Testimony of Ed Webster.)

Q. Up the creek from your dam? A. Yes, sir.

Q. How far up the creek?

A. Well, I couldn't say really that distance.

Q. About how far? I am speaking now of the stake that Garside set there as part of the Crown Point. About how far would you say that was up the creek from your dam?

A. It is a pretty hard thing for me to say.

Q. I am not asking you to be positive, but about how far?

A. Well, it is within 100 feet or more up from the dam.

Q. The distance between the stake and the dam is from 90 to 100 feet—isn't that right?

A. Somewheres along there. It is quite a while since I have seen it.

Q. It is not exactly opposite the dam, up the hillside?

A. Our dam—it doesn't show here—our dam was right in here, somewhere right about in there. [1392]

By the COURT.—Would that dam be shown on the plat from the land office?

Judge WINN.—I think not.

Q. Will you make a mark on this chart with a little circle where your dam was—make a circle on exhibit "N" at the point where your dam was in the creek.

A. I would say that that dam was right across the

(Testimony of Ed Webster.)

creek in there. I will make a circle there—of course, I am not sure of that.

Q. It would be relatively in that position—that is, the course taken from the dam to the post would be relatively the course indicated by you upon the plat there as being between the circle and the post as platted? A. Yes, sir.

Q. And the distance about from 90 to 100 feet?

A. Yes, I should say that.

Q. That is where you saw Garside put a stake—at that point you saw Garside put a stake?

A. Yes, I have seen the stake there.

Q. How was the stake marked, do you remember?

A. No, I do not.

Q. You know what kind of a looking stake it was?

A. Just a white stake.

Q. No legend on it at all?

A. I don't remember—there is lettering on it.

Q. But you don't remember what the lettering was? A. No.

Q. Garside set up his transit there at that point and then turned the angle there to go somewhere else?

A. That I couldn't say. I know they ran the line straight through from that way. [1393]

Q. What other stake of this Ebner group do you remember Garside putting in the ground?

A. That one there that is marked 6 and 2.

Q. 6 and 2 of what?

(Testimony of Ed Webster.)

A. Of the Webster Millsite.

Q. That has nothing to do with the Ebner survey?

A. They staked that—I didn't stake that, and they staked this one here.

Q. At that time Garside located a stake marked 2 there in a red circle, with a red figure, appearing on exhibit "N" as being the common southerly stake of the Webster Millsite and the Millsite lode—is that right? A. Yes, sir, and this one.

Q. And also located the stake appearing on the northerly end line of the Taku lode, at a point at the intersection of the Webster Millsite and the Taku lode? A. Yes, sir.

Q. You remember Garside putting that stake in?

A. Yes, sir.

Q. Now, that stake that Garside put at the intersection of the Webster Millsite and the Taku lode—do you remember the relative position of that stake? I am asking about the intersection stake of the Taku lode and Webster Millsite?

A. That was right, of course, what was supposed to be, on our line—they staked it right behind our cabin and they ran this line through here and I objected to them running this line—this was in plain sight, this was just right back of the cabin, on a little knoll?

Q. Is the cabin there yet? A. Yes, sir.

Q. It is there yet? [1394] A. Yes, sir.

Q. How far behind the cabin was the stake?

(Testimony of Ed Webster.)

A. About 50 feet, on a little knoll—it wouldn't be 50 feet; it was probably 40 feet from the cabin.

Q. How near the creek?

A. About 50 feet from where the bridge crossed the creek.

Q. About 50 feet away from the creek?

A. No, it wouldn't be quite that far; the creek takes a little turn in there.

Q. How far from the creek?

A. 40 to 50 feet—between 40 and 50 feet.

Q. And 40 feet behind your cabin? A. Yes, sir.

Q. And that cabin is still there?

A. Yes, sir; I have not been there for a few years. I suppose it is.

Q. And the stake is situated on the top of a little knoll?

A. Just on the side. There is a slope runs up the hill, up toward where he had his quarters and that stake was right there.

Q. Of course, you don't know whether any of these stakes on the ground now are in the same position? A. No; I can pretty near go to them.

Q. You don't know whether the stakes on the ground now are the same stakes you saw there?

A. No, I haven't been there since '98.

Q. Since '98 you have not been on the ground and know nothing about it? A. No.

Q. What other stakes of this Ebner survey do you remember Garside setting at that time? **[1395]**

A. That is all.

(Testimony of Ed Webster.)

Q. Just those three stakes?

A. Yes, sir, just those three stakes.

Q. Didn't you identify one as being located near the Thorp dam?

A. This is the one—Thorp had a dam above this.

Q. Is that dam there yet?

A. No, I don't think it is.

Q. You can't see that?

A. Ebner moved his dam away up above that.

Q. You wouldn't be able to see the Thorp dam on the ground where it had been?

A. I couldn't say whether it is there or not. I haven't been on the creek for a long time.

Q. But aside from that—you don't know anything about those stakes? A. No, sir.

Q. You don't know whether Garside ran the lines right or not? A. No.

Q. You only know that he ran them as surveyors usually run lines, with the use of a transit and tape?

A. He had his surveying instruments?

Q. And had his helpers with him?

A. Yes, sir.

(To follow the omission on page 260 of the original transcript [printed record, page 413] indicated by * * * , being part of the direct examination of Lloyd G. Hill (recalled), by Judge Winn.)

[Testimony of Lloyd G. Hill, for Plaintiff (Recalled).]

Q. (Repeated.) Mr. Hill, are you well acquainted with the creek bed and the creek at or near Corner No. 2 of the Lotta lode claim? **[1396]**

(Testimony of Lloyd G. Hill.)

A. Fairly so; yes, sir.

Q. How long have you been well acquainted with the creek along there, just about that point?

A. I have been acquainted with the creek there for about ten years.

Q. I will ask you to explain in your own way the appearance of the creek-bed there, without being specifically examined on it, the width of it, etc.?

A. At that point, just at the bottom of the falls which are about opposite the present Ebner mill, the thread of the creek is, I should judge, at right angles with the flow of the stream. It is from 45 to 60 feet wide—that includes the creek and creek bottom, at high water it is all water. At low water it is just a small stream and gravel and sand on each side of the thread of the stream and right opposite this corner—that is, on the southeast side of Gold Creek at a point opposite corner No. 2 is what they call the waste dump where all the waste taken out of the mine is dumped over the precipitous side of the bluff and falls into Gold Creek.

Q. (By the COURT.) How far from that creek? Indicate where that dump is.

A. That dump would be about—I will mark it with four black lines, "dump." That rock falling down into the creek-bed would have a tendency to throw the creek to the northwest.

Q. Throwing it to the northwest, would that throw it away from the corner No. 2 of the Lotta or towards the corner?

A. Toward the Corner No. 2 of the Lotta.

(Testimony of Lloyd G. Hill.)

Q. The ground, say from the southeasterly end of the Lotta lode claim down to the creek, you said the other day that it was somewhat precipitous—can you give a little better [1397] description of that ground there?

A. The surface of the ground extending in a northwesterly direction from stake No. 5 of the Lotta toward Gold Creek for a distance of about 250 feet is comparatively a gentle slope, and then the east side of the bluff of Gold Creek is encountered which is bare rock and stands on an angle of perhaps 65° from the horizontal. I have been over it several times and a misstep would mean that you would meet your death—you would fall clear down to the creek.

Q. I will ask you what about the practicability in running out that southwesterly side line of the Lotta of making an absolute measurement from corner No. 5 down to say the centre of the creek?

A. It would be very difficult. The most feasible way would be to jump over to the west side of the creek and then jump back again to the eastward into the creek, and then it would be very difficult because the west side of Gold Creek is in the same condition —it is absolutely impossible for any man to measure straight away along the Lotta line to the centre of Gold Creek with the methods that surveyors used 23 years ago—that is, 100 feet steel tape, steel chain, and tally-pins, if you had to plumb from the end of the chain.

(To follow the second omission of page 260 of the original transcript, [printed record, page 413] indi-

(Testimony of Lloyd G. Hill.)

cated by * * * , immediately following the words, "Cross-examination: By Mr. Hellenthal.")

Q. How wide is the canyon made by Gold Creek at the point of intersection with the southerly side line of the Lotta as you have it on exhibit "N"—from rim to rim at the bottom of [1398] the canyon, on a level with the creek where the water flows—how wide is the canyon there, from rim to rim?

A. That depends entirely at what stage you take the height of the water—at high water the canyon would be much wider than at low water.

Q. How wide would the canyon be at the highest stage of water?

A. I should say at right angles to the creek the canyon there would be fully 50 feet wide?

Q. At the highest stage of water? A. Yes, sir.

Q. The creek would then fill the canyon from rim to rim? A. Yes, sir.

Q. And the centre of the creek would be the centre of the canyon? A. It would; yes, sir.

Q. At the lowest stage of water how wide would the canyon be?

A. The canyon would be the same width.

Q. I am speaking from rim to rim on a level with the water—at the lowest stage of water?

A. It would be there about, I should imagine, 6, 10 or 12 feet wide.

Q. How high up perpendicularly is the highest stage of water from the lowest stage of water?

A. I don't know as I am qualified to answer that —it depends entirely upon the configuration of the

(Testimony of Lloyd G. Hill.)

bottom of the creek bed.

Q. Where does the creek flow at the lowest stage of water?

A. The creek is changing almost continuously.

Q. How far does it change?

A. It would change within the bed of the ravine.

[1399]

Q. How wide is the bed of the ravine?

A. I have said the bed of the ravine is between—at that point you are speaking about—I should judge, about 60 feet wide, between 50 and 60 feet.

Q. It is not over 60, anyhow?

A. I think not, at that point.

Q. Is it not a fact that when the water is low the creek generally runs about the middle of that bed?

A. No, not necessarily.

Q. Isn't that where it runs out generally and shifts around—runs about the middle there, does it not?

A. Yes, it runs more to the right—it has a tendency to cut into the southeast bank at low water.

Q. But the bank—the walls of this canyon, are rocky?

A. That is the wall on the southeast side.

Q. What is the wall on the other side?

A. The other wall is slide rock, gravel, all sorts of stuff—there is no bedrock there.

Q. It is slide rock all along the edge there and you have seen it in the same condition ever since you have been in the country?

A. Yes, on the northwest side.

(Testimony of Lloyd G. Hill.)

Q. The canyon has been the same width ever since you have been in the country?

A. Practically so, yes, sir.

Q. Is it not a fact that at the centre of the stream at that point is about now where it was when you first saw it and is always about the same place, and is always the same place at high and low water?

A. The creek at the intersection—yes, I judge it is. [1400]

Q. The water goes up and down the different seasons, but the centre is the same, whether at high or low water?

A. It would average from year to year.

Q. It shifts a little from year to year—there is a little sand in the bottom?

A. Yes, there is some rock.

Q. At the corner, near Corner No. 2 on the Lotta, how wide there is the Basin from rim to rim? I am speaking of the bottom of the canyon where the creek flows.

A. You want to apply this to the different elevations of the water?

Q. I am speaking now of the bed, at the bed of the creek, immediately above the water at its average stake—you understand what I mean?

A. I think I do.

Q. How wide is the canyon there?

A. The canyon there, I should say, was about 60 feet, at right angles to the flow of the creek.

Q. At that point where is the creek flowing at this time—about the centre?

(Testimony of Lloyd G. Hill.)

A. At that point at the present time where is the creek flowing?

Q. Yes.

A. No, I think it is not. I think the creek has been shifted out of the position as given by the old survey and is thrown off more to the northwest.

Q. Moved a little way from the centre?

A. Yes, sir.

Q. It is not quite in the centre there? A. No.

Q. Where is it now with reference to the northerly bank—how [1401] close to it is it?

A. It is pretty close to the northerly bank. I couldn't say just how far.

Q. At high water how wide is the creek at that point?

A. Well, I don't know, as you ask me the question. At the normal stage of water I said 60 feet; at high water it would be somewhat wider.

Q. You don't mean to say the creek is 60 feet at the normal stage of water there do you?

A. No.

Q. How wide is the creek?

A. The creek is probably 35 feet wide there, perhaps 40.

Q. How wide is the creek at high water?

A. The creek would be wider at high water.

Q. How much wider? A. Perhaps 55.

Q. It would be perhaps 55 feet at high water?

A. Yes, sir.

Q. In other words, at high water the creek would fill the canyon from rim to rim—about fill the bottom

(Testimony of Lloyd G. Hill.)

of the canyon from rim to rim?

A. It depends where you start the canyon.

Q. The edge of the creek at one side would strike the rim of the canyon and the edge of the creek on the other side would strike the other rim of the canyon at high water?

A. The bluff at that point comes down very sharply on the east side of the creek. The west side of the creek bears off more and wouldn't be called a canyon at all there—the creek would have a chance to move there in that direction. It is not rock, that is slide rock and gravel, and the creek would [1402] work over that way quite a ways, to the north and west.

Q. How far could it work over?

A. It could work over—I wouldn't attempt to say—it could work over 30 feet—25 or 30 feet.

Q. The creek at that point at this time is how near the bank or near the rim of the canyon at this particular point—at this time, I mean the average stage of water, as it was last year?

A. How far is it from the creek to the bank?

Q. Yes—on the west side?

A. Well, there isn't much down in between there; it is practically up to the bushes and slide rock in there and forming quite an eddy. It was that way last fall. I haven't seen it during the winter.

Q. Have you been up to this place since you testified here last? A. Yes, I was up there.

Q. When were you up to that point? Up to the point where stake No. 2 of the Lotta stands?

(Testimony of Lloyd G. Hill.)

A. I was up there yesterday afternoon—yesterday morning.

Q. Is that canyon full of snow?

A. Yes, there is a slide came down there.

Q. You can't tell anything about the bottom of the canyon?

A. Can't tell very much about it, no.

Q. You didn't go down there to measure it?

A. Yes, I went down.

Q. But you couldn't measure it? A. No.

Q. You remember testifying here the other day that that point in the canyon was 25 feet wide? [1403] A. No, I don't recollect that.

Q. If you so testified that was not true?

A. At that point the canyon was 25 feet wide?

Q. Yes.

A. At that time, if I testified to that, I must have been mistaken.

Q. You testified also, I think, that the general average in there of the canyon, general average of the entire canyon along there, was about the width of 25 feet, all along the line?

A. I didn't testify to that. I said between 25 and 40 feet. I remember the testimony very well.

(Above testimony represents all the omissions in the original transcript in the testimony of the plaintiff.) [1404]

Defense.

[Testimony Omitted from Original Transcript, Introduced by Defendant.]

The testimony omitted from the original transcript, introduced by the defendant, is as follows:

[Testimony of B. D. Stuart, for Defendant.]

(To follow the first omission on page 771 of the original transcript [printed record, page 964] indicated by * * * * , being part of the direct examination of B. D. Stuart by Mr. Hellenthal.)

Q. (Repeated from bottom of page 770.) I will ask you to state to the Court what you did in the fall of the year 1910 looking toward the location of that creek upon the ground?

A. The first thing I did was to make a traverse line down the road which is shown on the map as a sinuous double line.

Judge WINN.—Run along your traverse line.

The WITNESS.—I have only a portion of the curve—I have not located them all on the map. I began at my station #93 where I put my pointer and the next station on the Lotta was at 94.

Q. Are those indicated on the map?

A. They are indicated on the map by small black circles and the number of the station beside the circle.

Q. And the points you are pointing at are indicated in that manner on the map, all of them, the stations?

A. Yes, sir. The next point is marked 95 and the next one 97 near the border. I ran the traverse between those points just merely in connection with the location of this portion of the creek, and from station 95 I ran down to station at 120, on the bank above the creek, down to the creek at a point

(Testimony of B. D. Stuart.)

similarly marked for a station and numbered 107. From there I ran up the creek, locating the points which are indicated upon the banks of the creek upon [1405] the map by small red circles, that is, the definite point I measured to on the creek are indicated in that manner, up to what is marked Station 131, near what is presumed to be the northeast corner of the Lotta claim. Then having run up to station 131 and setting up there, I made a closed loop to my traverse by measuring back to station 93, I might explain that there are two ways by which I can check my traverse, by retracing the line which I have run and by running a loop and arriving back at the same point I started—if I arrive at the same point, it checks my traverse and I know it is correct. Another method would be by triangulation, measuring the base line and occupying each of the forks of the triangle at the station and the base line being one side of that triangle and measuring the angles between the lines of the triangle in that manner; for instance, I had for the base line in this instance, I had from station 95 to 97, which I measured very carefully; then I triangulated to what is marked for Corner 5 of the Lotta and occupied as a transit station each of the points marked 95, 97 and 5, the point indicated as the Lotta claim on the ground. If the sum of these angles equals 180° it is a check on the work and the result was 180° for the measurement of the angles. In connection with the traverse I ran down the road and around up the creek in order to locate the creek; in closing back on my

(Testimony of B. D. Stuart.)

station point—I might say that traverse was about 2000 feet or 2500 feet long—in closing back on my original point, I closed within 3/10 of a foot, so I am absolutely sure the creek is correct as indicated there within the boundaries of the Lotta claim; I located I believe it is 28 or 30 [1406] points between stations 107 and 131, 28 or 30 points along the bank of the creek.

Q. Did you locate one side or both sides of the creek.

A. Some points are on one and some on the other. With reference to the way I obtained the relation between this creek, as I have explained, and the side line of the Lotta, the corner which is marked with a black circle upon line 5–6 of the Lotta—it is presumably upon that line but it is not quite; there is a stake which marks the intersection of the Forrest patented lode claim with this supposed side line of the Lotta. I included that stake in my traverse as a station, so that it checks the position of that stake with reference to the road and with reference to the creek. From the points on the same traverse 95 and 97 I located Corner 5 of the Lotta and checked it in the manner I have stated, so that I know that line is correct with reference to the creek.

Q. When you say Corner 5, what do you refer to?

A. I mean a stake in the ground marked for that corner. I don't know that there is anything further. Do you want me to explain about the other stakes of the Lotta?

Q. That is all the surveying you did in connection

(Testimony of B. D. Stuart.)

with getting the relation of the creek to the supposed west side line of the Lotta,—that is all the surveying you did with reference to the creek?

A. No, it is not. The definite points I located on the creek below the Alaska-Juneau dam, which is marked Alaska-Juneau dam on the map where I have my pointer, are not indicated upon this map, merely those that are within the Lotta and near the boundary, but I located the creek in almost as [1407] careful a manner, not quite so particular about it, though.

Q. For the entire distance shown on the map?

A. Yes, sir.

Q. And you can testify that the creek is indicated and platted on that map, is correctly platted there from an actual survey you made?

A. Yes, sir, I can. I checked over the position of these points.

Q. And it is so platted?

A. It is so platted; yes, sir.

Q. What other lines did you run up there in connection with the making of these surveys? Please explain fully.

A. All the rest of the work upon this map was done by means of traverse lines. I closed in the manner I have stated wherever I possibly could.

Q. By actual survey did you establish all the matters and things indicated on the map?

A. No, I did not. The corner posts are the posts I found in the ground, as they are upon the ground now—I have indicated upon the map by means of circles at the particular corners. That includes

(Testimony of B. D. Stuart.)

also this red claim, the Canyon claim—the corners I found in the ground are marked with circles in connection with the rest of the work. Wherever a circle is not found it indicates that line was merely drawn in from other data.

(To follow the second omission on page 771 of the transcript originally written, [printed record, page 964] being part of the direct examination of Mr. H. D. Stuart by Mr. Hellenthal.)

Q. What did you find upon the ground in the way of a stake that is marked as stake No. 5 of the Lotta? [1408]

A. About the corner that was marked for corner No. 5 of the Lotta was a small stake, 2x3 inches it measured and marked—I believe, as near as I can remember, it was marked U. S. S. No. 87 on one side and post No. 5 on the other side.

Q. What did you find in the way of a stake along the line marked on this plat Lower side line of Lotta, as claimed by the Ebner Co.—what did you find along that line in the way of a stake except the stake you have described as being marked for Corner No. 5, other than that stake?

A. Just alongside the road, the Basin road, I found a corner post or a post at the end of a small bridge. It was marked Corner 4, Forrest lode.

Q. Did it have any legend upon it in connection with the Lotta?

A. I believe it was marked S. 87 on one side—nothing further than that.

Q. What else did you find along that line in the way of stakes?

(Testimony of B. D. Stuart.)

A. Above the Basin road, that would be northwesterly from the Basin road, but above the new high line flume, I found a stake which measured 5x5 inches and I think had been painted white at one time, and was inscribed.

Q. How was that inscribed?

A. It was inscribed, I believe, U. S. S. No. 545, Corner #2, and then on one side also it was inscribed S. 87—that is as near as I can remember the marking.

Q. Do you know what survey number that was—what survey was indicated by it?

A. 545—I believe that is the Dora group.

Q. Do you know the name of the claim?

A. The Etta.

Q. Did you see any other Etta stakes on the ground? [1409]

A. I saw one that was marked for the Etta survey; yes, sir.

Q. What kind of a survey was that and how did it compare with the stake you found on the corner of the Lotta as indicated on the ground?

A. Which corner of the Lotta?

Q. I mean how did the stake, that other stake you found, compare with the stake that you found in the ground at a point where Corner No. 6 of the Lotta would fall according to the line indicated on this plat as the lower side line of the Lotta as claimed by the Ebner Co.—how did those two stakes compare?

A. Just north of the Basin road again, a foot or so, as I remember, north of the road as platted here on

(Testimony of B. D. Stuart.)

the map, I found a small stake which compared. I think it was a scant 4x4 and standing about seven or eight inches above ground.

Q. That is one of the Etta stakes?

A. Yes, marked for Corner 1 of the Etta.

Q. What kind of a stake was that with reference to the stake you found at the other corner?

A. It was smaller and seemed to be a much older stake. I judge it was a much older stake from the markings—it wasn't inscribed; it was marked "pink"—it was cut in.

Q. It was a newer stake?

A. Yes, it seemed to me so.

Q. What was the condition of Corner No. 5, of the stake marked No. 5 on the ground, as to being set in the ground or nailed to another stake?

A. It was set alongside of another stake. The other stake, I think, was nailed to it when I was there. The stake it is nailed to is similar in character to the stake that is set [1410] for Corner No. 2 of the Etta, which is supposed to be identical with corner 6 of the Lotta—the stake it was nailed to was the same character as that. The corner itself which was marked with black paint was marked for Corner No. 5 of the Lotta, a much smaller stake, shorter and different from it in every way.

Judge WINN.—The one it was nailed to, do you mean?

A. No, the one that is marked and was nailed to the other one is a much smaller one and apparently different.

(Testimony of B. D. Stuart.)

Q. What was the character of the stake you found at the intersection of the Forrest?

A. I believe that was about 5x5 inches.

Q. A square stake? A. A square stake; yes.

Q. Is that the same character of stake you found at No. 6 and 5 of the Lotta?

A. In general appearance—it is the same sort of a piece of timber.

Q. How does it compare with this piece of timber at Corner #6 in reference to age?

A. In a general way, I should say—it seems to me that they were pretty close to the same age, the same state of preservation.

Q. What other stakes did you find upon the ground there?

A. Up the hill from the post marked for Corner No. 5 of the Lotta I found two stakes which were set on the steeper hillside above.

Q. How were they marked?

A. One was in the neighborhood of 145 feet, or something like that, above Corner #5, in a northeasterly direction, say a 2x3 stake and marked U. S. S. No. 87, Post No. 4. [1411]

Q. Where is that one?

A. About 145 feet, a little northeasterly, from that Corner No. 5 of the Lotta.

Q. Can you give the exact measurement of those stakes as they were at that time?

A. The distance was 144.92 feet.

Q. What else did you find in running the stakes on that ground?

(Testimony of B. D. Stuart.)

A. I found another post, 2x3 inches, 140 feet beyond the one marked for Corner No. 4.

Q. Which map are you testifying from?

A. I just got the distance from this other map.

Q. What else, if anything, did you find in the way of stakes upon the ground there?

A. You mean with reference to the Lotta?

Q. I mean with reference to the Lotta—did you find Corner #1?

A. Nothing further than this little corner marked for Corner 1 of the Etta, which is presumed to be what the patent notes called for—it would be identical with Corner No. 1 of the Lotta.

Q. How was it marked?

A. I couldn't make out any Lotta markings on it. The post had been broken off and rusted in the ground—the post had been evidently broken off.

By the COURT.—Corner 1 of the Lotta—you mean stake?

A. I mean stake No. 1. It is a post described in the patent as being Corner No. 1—that is the way it is described in the patent.

Q. Did that stake have any Lotta markings on it?

A. I could make none out of it.

Q. What distance is that from stake marked No. 6—that had [1412] the Ebner markings on it?

A. 141.3.

Q. What is the distance between that stake you last spoke of and the stake 6 marked for the Etta, also for the Corner #6 of the Lotta?

A. 141.3 feet.

(Testimony of B. D. Stuart.)

Q. You found no other stakes upon the ground that indicated or that were marked as Lotta stakes or that were anywhere near where the Lotta stakes ought to be? A. I did not, no.

Q. Are you familiar with the notes in the patent of the Lotta? A. I have read them over; yes, sir.

Q. Are you familiar with the plat included in the patent? A. Yes, sir.

Q. What is the distance between the stake that is marked as Corner 5 and the stake marked Corner #6 as you have described them—the total distance?

A. 1524.7 feet.

Q. What is the course—the course of that line?

A. It is about north 31–38 west—that is, beginning at Corner No. 5. From Corner No. 5 to Corner No. 6 there is a break in the line as indicated by the posts on the ground.

Q. There is a break in it?

A. A slight break, yes. The post which marks the intersection of the Forrest lode with the Lotta lode is not quite on a line with the post for No. 5 and the post for No. 6.

Q. How much is it off the line?

A. It is in the neighborhood of a foot and a half, I believe. I don't remember exactly.

Q. But ignoring that corner, that post rather, the course you have indicated is the course between the two stakes? A. It is; yes, sir. **[1413]**

Judge WINN.—I understand Mr. Stuart is giving the actual course as he made it.

Mr. HELLENTHAL.—As he found it on the ground between the stakes.

(Testimony of B. D. Stuart.)

Judge WINN.—Not as the survey shows.

A. No, as I determined it—

Q. From actual surveys made on the ground?

A. Yes. I determined the course by solar observation.

Q. Now, what is the course between Corner No. 5 as it is marked on the ground and Corner No. 4?

A. North 58–22 east.

Q. And what is the distance? A. 144.9 feet.

Q. What is the course between 3 and 4?

A. North 57–55 east, 140.3 feet.

Q. Those two courses don't compare?

A. There is a very slight difference. In measuring to those posts I set a small nail in the center of the post and measured to that nail and if the post leaned a little bit one way or the other it might make that difference in the course.

Q. About the stake No. 6, the Etta stake—how far is that from No. 1 stake as it exists upon the ground?

A. The course is 56–50 east 141.3 feet.

Q. How do the courses you find you have to run upon the ground between these different stakes compare with the courses given in the patent notes?

A. They are all different.

Q. How different are they?

A. In the neighborhood of 2°. I believe on the west side line of the Lotta I found 2° 12′ between Corner #5 and the corner [1414] of the Forrest.

Q. How much is the difference in the other course?

A. You mean down to the minute?

Q. Yes; between Corner No. 3 and Corner No. 5.

By the COURT.—You are speaking now of these

(Testimony of B. D. Stuart.)

posts that he found, that have been spoken of heretofore?

Mr. HELLENTHAL.—I am speaking of the posts that are on the ground.

By the COURT.—The posts that have been testified to by the plaintiff?

Mr. HELLENTHAL.—The same identical posts.

The WITNESS.—A degree and 55′ from Corner 3 to Corner 5.

Q. The variation then is not the same between the two courses? A. Not quite.

Q. The angle is different?

A. A little different; yes, sir.

Q. What is the distance between stake No. 5 marked upon the ground and the center of the creek?

A. 560 feet.

Q. What is the distance between the point where Corner No. 2 would fall, if the Number 1 and 6 as found upon the ground were assumed to be in a correct position to the creek?

A. 965 feet. I give those figures in even feet.

Q. Corner No. 2 I am speaking of, and the centre of the creek—what is the distance between Corner 6 and the creek? A. 965 feet.

Q. What is the distance between corner 2 and the creek, assuming that the stakes 1 and 6 are in the correct original position—what is the distance between the point where No. 2 would fall and the centre of the creek? [1415]

A. It scales 82 feet.

By the COURT.—You didn't find Corner 2—you

(Testimony of B. D. Stuart.)

didn't find a stake? A. No, sir.

Q. Explain that—how you got that corner.

A. I drew a line from the point marked Corner 1 of the Lotta parallel to the end line 3–5 of the Lotta and gave it the distance which is called for in the patent, 150 feet.

Q. How does the easterly side line compare with the westerly side line in length as indicated upon that map? A. Approximately the same.

Q. What is the condition of that southerly or westerly line of the Lotta? Explain to the Court whether it is a difficult matter to survey that line or a difficult matter to plat the creek.

A. I don't consider it so; no, sir.

Q. Is there any difficulty anywhere in measuring the distance between stake No. 5 and the creek?

A. I don't consider it is difficult; no, sir.

Q. Now, do you have the measurements between stake No. 3 and stake No. 5 as found upon the ground, without reducing them to a horizontal?

A. I haven't that here. I have my notes and can get that for you.

Q. You are familiar with the notes as given in the patent? A. I am; yes, sir.

Q. If you follow the notes as given in the patent, assuming the creek to be in the correct position that you have testified it is, will you tell the Court where the Lotta claim would lie?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff allowed an [1416] exception.

(Testimony of B. D. Stuart.)

Q. I am calling your attention, now, to the plat marked for Identification Exhibit No. 6, and ask you if you will indicate to the Court where the Lotta claim would lie if platted and surveyed according to the field-notes—in accordance with the field-notes and the plat contained in the patent to the Lotta claim.

Judge WINN.—I don't think that was in the former question. I make the same objection and add that the plat made in the record-book as being a part of the patent is not the plat that controls in the patent at all, that the certified copy from the surveyor general's office is the one that controls. Objection overruled. Plaintiff allowed an exception.

A. The position it would be given by the ties as you have explained are indicated on Defendant's Exhibit No. 6 in red—the red rectangle, with the courses and distances marked on it.

Q. I will ask you to explain to the Court how and why you so locate the Lotta upon the ground with reference to the note as given in the patent—explain the whole matter carefully, why it is done that way and the way it is done.

Same objection. Objection overruled and plaintiff excepts.

A. The distance as given in the patent from Corner No. 5 of the Lotta to Gold Creek on that map accompanying the patent is 1200 feet—the distance from Corner No. 2 is given as 40 feet.

Q. What is the course given in the patent?

A. The course of the side lines—that is marked

(Testimony of B. D. Stuart.)

incorrectly here—it should be North 34–35 west and south 33–45 east for the side lines, with a distance of 1500 feet. The course of the end lines is northeast and southwest 56–15 and the [1417] length is 300 feet.

Q. Explain what the claim is tied to in the patent.

A. The distances are given to the creek and the rectangle in red on this exhibit was put on in accordance with those distances to the creek from the corners and in accordance with the courses and distances given in the patent for the side and end lines.

Q. Are there any ties in the patent notes other than the creek? A. Not for the Lotta claim.

Q. Now, is there any other place on Gold Creek, along its entire course, say from mineral monument to where it flows into Gastineau Channel, where that claim can be located and tied to the creek in the manner indicated by the patent, other than the place where you have located it upon your plat?

Judge WINN.—I object to that as incompetent, irrelevant and immaterial, too general in its nature, and assuming something that I think Mr. Stuart himself will not contend for—that a call to the natural object is a tie for the survey.

Objection overruled. Plaintiff allowed an exception.

Q. As a surveyor, do you regard those calls or ties whatever they are to the creek, as ties?

A. I do, taken together—there are two ties from the corners to the creek, and if those ties were cor-

(Testimony of B. D. Stuart.)

rect, the claim could lie in no other position than I have given here.

Q. You may now answer my question that Judge Winn objected to—you have practically answered it but the answer given is not responsive to the last question. Could the claim be located at any other point on Gold Creek and tied to the creek in accordance with the notes and plat contained within **[1418]** the patent, preserving the courses and distances given in the patent—could the claim be located at any other point on Gold Creek, other than the point at which you have located it on exhibit 6?

Same objection. Objection overruled. Plaintiff allowed an exception.

A. I would say yes, so far as I know Gold Creek.

Q. Could it be located at any other place—yes or no?

A. I think not. I would like to explain that answer. I will state to the Court that the creek at this point has a course which, I believe, it has not at any other point throughout the length of it—that I know, turning as it does in its course through the Lotta claim. The rest of the creek, I do not believe there is any other reach of that length which would allow of the claim being tied to it in the way it is tied in the patent notes.

Q. I will confine the question to the part of the creek you have surveyed. I will ask you if it could be tied to any part of the creek that you have surveyed, between Cape Horn or between the Ebner mill and Snowslide Gulch? A. No, sir.

(Testimony of B. D. Stuart.)

Judge WINN.—I move to strike the answer of the witness to the former question, as it was not shown that Mr. Stuart was sufficiently familiar with the creek to answer a hypothetical question of the kind propounded.

By the COURT.—The answer is in without objection. Motion denied. Plaintiff allowed an exception.

Judge WINN.—Now, I object to this last question and answer on the same grounds.

Objection overruled. Plaintiff allowed an exception. **[1419]**

Q. My question this time is, is it possible to locate the Lotta claim as described in the patent field-notes and plat upon that creek, tied to the creek as they are described, at any other place between the Ebner mill and Snowslide Gulch other than the place at which you have located it and indicated by your red lines?

Same objection. Objection overruled. Plaintiff excepts.

A. I should say it is not.

Q. I mean the red lines on exhibit No. 6?

A. I should say it was not possible.

Q. I hand you a piece of cardboard and ask you to take that and use it and explain to the Court the reason why it is not possible to locate that claim in any place except the place at which you have located it.

Objected to as cross-examination of their own witness.

(Testimony of B. D. Stuart.)

Objection overruled. Plaintiff allowed an exception.

A. This piece of cardboard I made for convenience. It is made to conform to the size and shape of the Lotta claim as called for in the patent, and I have marked the corners on the cardboard to conform to the corners as they are in the Lotta.

By the COURT.—It is made on a scale?

A. On the same scale as that map, 50 feet to the inch, and upon it I have also marked off the ties to the creek as given in the patent. (The cardboard is marked Defendant's Exhibit No. 26 and admitted in evidence.) Now, putting the cardboard, so that the boundaries of the cardboard conform to the Lotta lines on the exhibit, the ties to the creek on the two corners mentioned fit—

Q. Do you want to use the protractor? **[1420]**

A. No, I do not. Now, maintaining the cardboard in a position parallel with the lines of the Lotta as indicated in red on the exhibit, if the cardboard is lowered and the tie of 40 feet from Corner No. 2 to the creek is maintained, the point 40 feet from the Lotta falls below the creek; and in the same way, if the distance of 1200 feet is maintained from Corner No. 5 of the Lotta and the distance of 1200 feet is maintained there and that point is kept upon the creek, and the cardboard maintained in the position parallel to the Lotta lines, the other intersection falls out of the creek entirely. That is the only position that that cardboard can lie—the positions indicated by the red lines is the only position in

(Testimony of B. D. Stuart.)

which the cardboard can lie and make both ties conform to the notes.

Q. Now, Mr. Stuart, are you familiar with the field-notes of the Lotta that are found in the U. S. Surveyor General's office, and in evidence here?

A. Yes, sir, I am.

Q. Is the Lotta claim tied to anything by those notes? A. To the creek.

Q. I hand you here a map marked "B," which purports to be a certified copy of the official plat as found in the surveyor general's office of the surveyor general at Juneau. Are you familiar with the notes as given in that plat? A. I believe I am.

Q. Are you also familiar with the notes as given in the surveyor general's office, independent of the plat and field-notes? A. Yes, sir, I am.

Q. Those field-notes—to what do they tie?

Objected to as not the best evidence. Objection sustained. **[1421]** Defendant allowed an exception.

Q. Are you familiar with the field-notes of the Lotta in the surveyor general's office?

A. I have read them over. I think I am familiar with them.

Q. What, if any, ties to natural objects or permanent monuments is found in those field-notes?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and there is no foundation laid for the witness to answer the question. It is not the best evidence, and furthermore, it appears from all the evidence in this case up to the present

(Testimony of B. D. Stuart.)

time that the surveyed Lotta includes a survey of a group of claims and is treated in law and in contemplation of the rules and regulations of the surveyor general's office as absolutely one survey—to segregate one claim that way is unfair.

Objection overruled. Plaintiff allowed an exception.

A. I believe it is tied to the creek.

Q. What are the courses and distances given to the creek?

A. The courses given are the same as given in the patent. The distances are different; that distance from Corner No. 5 to the creek, being a thousand feet instead of 1,200 feet, and that distance from Corner No. 2 to the Creek being 50 feet instead of 40 feet.

Q. Now, I will again hand you this cardboard, to lie upon this plat, upon the map exhibit 6, and tell us the only place where the Lotta claim could lie in accordance with the field-notes of the surveyor general's office and the plat I have handed you, which purports to be the official plat of the survey of the Lotta?

A. I have it drawn on the other exhibit but not on this.

Q. Exhibit No. 7? **[1422]**

A. It is marked on the exhibit 7 in blue ink. It is the only rectangular claim in that vicinity which is marked in blue ink. I find the position of it the same way—I find the position in connection with the notes of the patent,—the position of it would be that

(Testimony of B. D. Stuart.)

which the cardboard maintains at the present time.

Q. What cardboard is this?

A. The outline of the cardboard is the same as indicated in the lines with blue ink.

Q. Is there any possible position that the claim could be located, in accordance with the surveyor general's field-notes and plat, observing the ties and courses and distances and ties to natural objects and permanent monuments, other than you have indicated on Defendant's Exhibit Number 7?

Judge WINN.—We object to the question as incompetent, irrelevant and immaterial, and for the further reason that there is not any tie in the field-notes of the Lotta claim, of the survey of the Lotta claim, that ties it to the creek. The only tie of the Lotta is the tie that is made to the group of claims; that was all surveyed under one order of the surveyor general, and always treated as one survey, consisting of the Lotta, Taku, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel, and that it plainly shows from the survey that that survey is treated as one survey and shows from the official map and plat that the witness is testifying from, that the group of claims is tied up to a United States government monument.

Objection overruled. Plaintiff allowed an exception.

Mr. SHACKLEFORD.—So that there may be no mistake about the appearance of the plat at the time witness is examined, we **[1423]** desire to call the attention of counsel and the Court to the course

(Testimony of B. D. Stuart.)

given from Corner No. 5 to the creek of one thousand feet and to the course given from Corner No. 2 to the creek of 50 feet as platted on Plaintiff's Exhibit "B."

Q. You may answer my last question.

A. I believe not.

Q. Will you explain to the Court why?

Objected to for the same reason. Objection overruled. Plaintiff allowed an exception.

A. The same explanation as in the case of the notes that are given in the patent.

Q. I will ask you where the southerly side-line of the Lotta would fall if you observed the ties to Gold Creek given and indicated in the patent to the Lotta and maintain the courses or maintain the course rather that you are obliged to follow in going from the stake No. 5 to the stake marked No. 6 as found upon the ground?

A. I think I understand your question all right.

Q. I mean, if you draw the line parallel with the line marked lower side-line of the Lotta as claimed by the Ebner Company to be along the line as marked on this map, lower side-line of the Lotta as called for by patent tie to creek, or the end-line as claimed by the Ebner Company to run parallel to the end-line as determined by the stakes in the ground?

A. It is the line so marked upon this exhibit.

Judge WINN.—Define it.

A. It is in black ink—that is the line that is indicated, the lower side-line.

Q. How many feet above the lower side-line of the Lotta would that line fall—that is, how many feet

(Testimony of B. D. Stuart.)

above the line **[1424]** drawn between the stakes marked 5 and 6 as they are found upon the ground would that line fall? A. It scales 122 feet.

Q. It would throw the side-line up the creek that distance? A. Yes, sir.

Q. Now, I will ask you to examine the patent notes of the Lotta, and inform the Court whether the Lotta claim is tied to anything other than the creek?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and as a conclusion of law, and he has already answered it once or twice.

Objection overruled. Plaintiff allowed an exception.

Q. I will ask the question this way: I hand you here the exhibit marked "B," which purports to be a certified copy of the patent of the Lotta and some other claims, and ask you to look at it and explain to the Court to what the Lotta is tied in accordance with the notes and other data given in that patent in the way of natural objects, permanent monuments or other things that may be found upon the ground.

Judge WINN.—We object as incompetent, irrelevant and immaterial. The paper is the best evidence, the patent.

Objection overruled. Plaintiff allowed an exception.

A. In the notes to the patent itself I don't see any tie. The only ties indicated on the Lotta claim on the map are ties to the creek.

Q. In the notes in the patent itself you find no tie whatsoever? A. No, sir.

(Testimony of B. D. Stuart.)

Q. What do you find in the plat that is part of the patent?

Same objection. Objection overruled. Plaintiff excepts.

A. Just distances given from the corner to the creek. **[1425]**

Q. Those are the same distances you gave before?

A. They are; yes, sir.

Q. There are in that patent no other ties to which the Lotta is tied? A. I find none.

Q. Do you know the magnetic variation given in that patent?

A. I believe it states 30° east of north.

Q. Is that the correct variation as you find it at this time? A. It is not; no, sir.

Q. Did you make a solar observation? A. I did.

Q. What did you find the magnetic variation to be at that time?

A. The time I made my solar observation at corner No. 5 of the Lotta I found the magnetic variation to be, I believe, 32° 30′.

Q. A difference of how many degrees?

A, 2° and 30′.

Q. Have you any means of knowing what the magnetic variation was at the time the survey was made?

A. The only means I would have would be from scientific text-books or charts or something of that kind.

Q. Does the magnetic variation change from time to time?

A. The variation doesn't change, but referring to

(Testimony of B. D. Stuart.)

the declination, the declination changes, yes, sir.

Q. Does that make any difference in the variation?

A. The variation is the change in the declination.

Q. Explain that.

A. The declination is the angle which the magnetic meridian bears to the true meridian—that is the declination. It is very often referred to as the variation, but really the variation is the change which takes place in that angle, **[1426]** between the magnetic meridian and the true meridian; the declination changes with the time, with the place—changes on the same day as much as fifteen minutes sometimes at the same place.

Q. It is not constant.

A. It is not constant, no, sir; and the variation which this declination is subject to also fluctuates.

Q. With the declination? A. Yes, sir.

Q. So there is no way of telling at this time what the magnetic declination or variation was at the time the survey was made?

A. I have no means of determining it; no, sir.

Q. Explain to the Court the difference between running a line with a transit and with a compass.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

A. In making a survey with the compass, the meridian used and from which the angle is deflected is determined by means of a magnetic needle which does not point to the true north, but a certain angle

(Testimony of B. D. Stuart.)

from the true north. By means of the transit the meridian may be determined either by means of the needle attached to the transit which is a part of it, or by means of the solar or astronomical observation.

Q. How is it determined—in making a survey for a patent how is the meridian determined—in surveying a mining claim for patent? In doing the work and in determining the lines upon the ground with a transit, how do you determine the courses or how do you determine the meridian?

Objected to as incompetent, irrelevant and immaterial. [1427]

Objection overruled. Plaintiff allowed an exception.

A. In making a particular survey or careful survey, such as a patent survey is, the needle is entirely disregarded in determining the meridian and the meridian is determined by means of the transit from an astronomical observation.

Judge WINN.—I move to strike the answer as not throwing any light upon this case.

Motion denied. Plaintiff allowed an exception.

Q. In running out the lines for patent notes is any attention paid to the variation given in the patent?

Same objection. Objection overruled. Plaintiff excepts.

A. No, sir.

Q. Does that in any wise affect the location of the claim as surveyed upon the ground?

Same objection. Objection overruled. Plaintiff excepts.

(Testimony of B. D. Stuart.)

A. No, sir; it does not.

Q. Now, if you were to start, or if anyone were to start with a compass and start at any given point along either of the end-lines or either of the side-lines of the Lotta claim, marked on Exhibit No. 7 with a dark line or with a black line, and as described by you as being the lines drawn between the stakes found upon the ground—if one with a compass would start at any given point along either of the side-lines or end-lines as so marked, taking for granted that the variation and declination between the compass and the true meridian was as given in the patent, how would the lines so run compare with the lines as they exist upon the ground, when the claim is run out in accordance with the stakes that are found?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception. **[1428]**

A. Such person starting from any point on the Lotta claim as indicated by the posts on the ground, running from that point to any other point on the claim, assuming magnetic declination of 30°—he would probably retrace the lines as they are upon the ground.

Q. Probably retrace the lines as they are upon the ground? A. Yes, sir.

Q. Do you know what the distance is measured on the ground from Corner No. 4 to stake marked No. 5 of the Lotta lode—reducing the measurement to the

(Testimony of B. D. Stuart.)

horizontal? A. May I refer to my notes?

Q. You may.

A. The distance measured from the axis of my instrument to Corner No. 4, the instrument being set up at Corner No. 5, is 149.3 feet. The distance on the ground would be somewhat greater than that, that is, measuring from the surface underneath my instrument to the post would make the angle a little steeper and would make the slope distance somewhat greater.

Q. About how much greater?

A. Four or five inches, I should say, offhand.

Q. That, then, would make the distance on the ground from stake to stake within an inch or so of being exactly 150 feet? A. Yes, sir.

Q. You haven't at this time the measurements from stake No. 1 to stake 6 or any other stakes?

A. No, I didn't measure them directly. I located each one from my traverse and figured the distance between them.

Q. Now, you testified something about a tracing-line, and about surveying the line with a compass and a transit on Saturday. [1429] I wish you would make that clear to the Court as to how and what a surveyor would do and the manner in which he would work, running on the ground with a transit where the ground had not been previously surveyed. I didn't include that in my question Saturday.

A. In the matter of getting his courses?

(Testimony of B. D. Stuart.)

Q. Yes.

A. The first thing he would have to do would be to make an astronomical observation of some kind. He would have to have that before he could determine the declination of the needle at that place.

Q. That done, how would he proceed?

A. He would proceed to deflect his angles from the true meridian as determined by the astronomical observation.

Q. Would the needle be of any assistance to him in the first instance?

A. Not knowing the declination, it would not.

Q. Now, the line once having been established in the manner you have indicated by taking a solar observation and being afterwards retraced by a compass—I will withdraw that.

Q. After you take the solar observation, then what do you do with reference to your declination—what do you do about that?

A. Having determined your true meridian, you set the sight of your telescope upon the true meridian, then read the needle on the needle plate and it gives you the declination at that place and at that time.

Q. You have already testified that that declination is not constant? A. Yes, sir. **[1430]**

Q. But varies from time to time?

A. From time to time and place to place.

Q. How about from place to place?

(Testimony of B. D. Stuart.)

A. It varies also from place to place.

Q. In a mineral country like this, it frequently varies a great deal in a short distance?

A. It does.

Q. Now, having surveyed a claim with a transit according to the true meridian ascertained by taking an astronomical observation and having found your magnetic declination, in tracing the claim upon the ground with a compass, not with a transit but a compass, what would you do, what is the only way it could be retraced to take into consideration the declination, as you found it by means of your astronomical observation and compass, making allowance for that declination in the pointing of your compass and needle?

A. You proceed with the survey in that way.

Q. If the declination had changed between the time the survey was originally made and the declination determined and the time at which the lines were afterwards sought to be retraced by the use of the compass, how would that change appear in the lines as afterwards found if the work was done properly in both cases?

A. The difference between the two lines would be the difference in the variation or the declination.

Q. If the declination was erroneously given in the first instance, the same result would follow?

A. The line would be in error; yes, sir.

Q. The line would be in error to the extent—

(Testimony of B. D. Stuart.)

A. Of the error in the original work. [1431]

Q. In the declination? A. Yes.

Q. In retracing the line, now, with a transit, how do you proceed?

A. Well, you set up at some known point on the survey and obtain the true meridian by means of an astronomical observation and deflect your angles from that true meridian according to the notes that you had.

Q. Pay no attention to the variation indicated in the patent or in the notes? A. No, sir.

Q. Why wouldn't you pay any attention to it?

A. Because the declination of the needle in the first instance might have been erroneous and the change in the declination might have been such as to affect the retracing.

Q. The surveys made by you in this connection you have testified have been made after taking an observation? A. Yes, sir.

Q. An astronomical observation?

A. They had.

Q. Did you survey the width of the creek at the canyon, at the point where the line 5–6 crosses the creek as indicated upon the ground by those stakes—the line 5–6 of the Lotta?

A. I did. I located points on each side of the creek there.

Q. Do the points show on your exhibit No. 7?

A. The point on the north side of the creek shows.

Q. Does the other one show?

A. No, I located a notice on the other side of the

(Testimony of B. D. Stuart.)

creek but it doesn't show on this map.

Q. Place it on? [1432]

A. As near as I can, yes.

Q. I will now ask you to tell me what the width is of the canyon at that point, at the level of the creek?

A. That creek was platted on and I can scale it. The width of the creek at the water level at the time I made it was 15 feet.

Q. When you speak of the width of the creek or the width of the canyon you mean—

A. The width of the canyon at the creek level, at the water surface, measured at right angles to the course of the creek.

Q. How are the walls at that point as to being perpendicular or otherwise?

A. Very steep, rocky, solid rock—bedrock.

Q. Does it go up before you reach a bench?

A. On the southeasterly side of the creek—it would be more easterly—on the easterly side of the creek, I should say it rises—it goes clear to the top of the ridge almost, almost to the ridge at the top but there the rock behind changes and stops. Part of it is, I should say, 50 feet high. On the other side it is not quite so steep—perhaps rises, I should say, at an angle of at least 50° for an elevation of 40 or 50 feet, as I remember.

Q. Now, at that elevation, at your 50 feet, when you reach the first bench, about what is the width of the canyon—do you know exactly what it is or do you have to approximate it?

(Testimony of B. D. Stuart.)

A. I would have to approximate it.

Q. Approximately how wide is the canyon?

A. I should say it was about 160 feet—160 or 170 feet.

Q. And the walls do not deflect one way or the other very [1433] much between those two levels?

A. Not very much.

Q. What is the character of the walls as to being rocky or otherwise?

A. On the south side it is solid rock; on the north side it is solid rock for some distance above the creek, covered though by a washout the bedrock is exposed in the bottom of the creek.

Q. What is the character of the canyon at other points along the course of the creek as indicated on exhibit 7 within the boundaries of the Lotta or thereabouts as compared with the canyon at the point which you have just described?

A. They are fully as steep at other places, if not steeper, above and below that point.

Q. As to the width of the canyon, how does the balance of the canyon compare with that place?

A. I should say it was fully as narrow.

Q. What is the condition of the canyon at the point nearest stake No. 2 or Corner No. 2?

A. The east side of the creek is a rocky bluff,—the north side of the creek is not quite so solid rock—it is rock, too, but the wash from the hillside above has come down and made a sort of slide near the point where corner No. 2 should be according to the stakes on the ground—it is very steep,—one can hardly

(Testimony of B. D. Stuart.)

climb up it.

Q. Taking into consideration the condition of the ground and the topography of the ground there, is there any chance for that creek to change its course at any point between the falls or at any point between the bridge across the Humboldt mill and the present dam of the Alaska-Juneau Company?

Judge WINN.—We object to that as incompetent, irrelevant and [1434] immaterial and no foundation laid.

By the COURT.—How far up have you surveyed the creek?

A. I have surveyed it up about opposite the Ebner mill. I did not locate points through there; I couldn't get through to the corner. When I was there at stake 131, station 131, I took a sight, ran up the course of the creek and put the creek in from that sight, sighted it up through—the falls and rapids above change the centre of the creek and I put the creek on from that. The creek, as a matter of fact, I think winds back and forth in there but that is the general course of it through the centre.

Objection overruled. Plaintiff allowed an exception.

Q. You may answer the question.

A. Judging from what I know of the stream and that character of rock, I should say that it would, within a generation it would change.

Judge WINN.—We move to strike the answer as not an answer to the question and no foundation laid by the witness to answer the question.

(Testimony of B. D. Stuart.)

Motion denied. Plaintiff allowed an exception.

Q. When you say in a generation, what do you mean by that term—about how long?

A. Within three score years and ten.

Q. What, if anything, did you do in the way of surveying the Colorado claim?

A. I surveyed the Colorado claim, that is, I ran a traverse to the points where the corners should be. I found posts—what I take to be posts—for corners Number 5, the northwest corner, and Number 5, the southwest corner.

Q. Did you find a post marked for the Colorado at Corner No. 5? [1435]

A. No, sir, I found a pile of rocks with the stub of a broken off post in them.

Q. That was approximately, however, at the point where corner No. 5 of the Colorado would fall?

A. Yes, as determined from Corner No. 5 of the Idaho.

By the COURT.—Where is corner No. 5 of the Idaho?

A. It is marked 5 and is just above the letter "h" in the word "Idaho" on Exhibit 7—I found a post there at that point.

Q. Describe that post?

A. It is a post 4x4 inches, painted white, standing 2 feet above ground, post in very good condition, located on the side of a steep bank just below the trail leading from the south end of the Jualpa dam to Snowslide Gulch and 50 or 60 feet south of Gold Creek—post described as 5 S. 641 Idaho.

(Testimony of B. D. Stuart.)

Q. Starting from that point on the Idaho and running to Corner No. 5 of the Colorado, you found the mound of rocks with the piece of stick in them as you have just described? A. Yes, sir.

Q. Do you know what relation that corner bears to the Last Chance surveys, in accordance with the notes of the surveyor general's office?

A. I have never looked up the Last Chance survey. It was pointed out to me as being that corner by those with me.

Q. What other stakes did you find upon the ground that were marked for the Colorado?

A. I found a stake which was marked for the common corner of the Colorado and the Idaho.

Q. Did it have any Colorado marks on it?

A. Just the survey number, the survey number for both claims just the same—it was marked for both corners. [1436]

Q. Where is that stake? Indicate on exhibit 7.

A. It is not numbered. It is Corner No. 4.

Q. Mark it Corner No. 4, then.

A. It is marked with a black circle, with a "4" above it in lead pencil.

Q. What, if any, stakes did you find on the Colorado that had any Colorado marks on them besides those two?

A. I found no other. I might say in looking for the other corners I ran on what would be the course indicated by the line I had determined, ran a line up until it intersected the brushed-out line, the Lotta side line, as indicated by the stakes on the ground;

(Testimony of B. D. Stuart.)

there were three of us and we made very diligent search in that vicinity for a radius of 300 feet, perhaps spent an hour, and found no indication of a corner.

Q. Did you find any indication of any stakes of the Colorado anywhere along the line?

A. No, sir.

Q. Except those you have indicated?

A. No. I then ran that line out to the southeast for several hundred feet and searched in the vicinity of where the southeast corner should have been in the same way. We probably spent two or three hours up there within a radius of three or four hundred feet, searched for marks which were called for in the patent notes. One mark was a cross on a boulder and we searched very diligently for that and found nothing.

Q. Did you find any corners that were marked as corners of the Nevada? A. I did; yes, sir. [1437]

Q. Did you find any stake 4x4, 2 feet above the ground, firmly settled on the rocks there?

A. I did not.

Q. What did you find there, generally? (Withdrawn.)

Q. I will ask you if you are familiar with the patent notes of the Colorado?

A. I have read them over; yes, sir.

Q. Will you indicate upon exhibit 7 where the Colorado would lie if platted in accordance with the field-notes as given in the patent?

(Testimony of B. D. Stuart.)

Judge WINN.—We demand the production of the field-notes of the Colorado.

Mr. HELLENTHAL.—They are already in evidence.

Q. I hand you here the plat marked Defendant's Exhibit 2, which purports to be a certified copy of the official plat from the surveyor general's office of the Colorado and ask you to look at it and then state where the Colorado would lie upon the ground, or where the Colorado would be platted upon your plat No. 7 if platted in accordance with the notes indicated upon that plat?

Judge WINN.—May I ask a question?

By the COURT.—Yes, sir.

Q. (By Judge WINN.) I will ask you if you can correctly plat the claim, on the plat there with the field-notes?

A. I can with the courses and distances given in the plat; yes.

(The field-notes are admitted in evidence as Defendant's Exhibit No. 27.)

Judge WINN.—I object to any of this testimony in this case pertaining to the Colorado lode—it is not contended in this case that there is any conflict between the Parish No. 2 and [1438] the Colorado, nor is it contended that there is any conflict between the Lotta patented claim and the Colorado and any evidence pertaining to the Colorado is immaterial.

Objection overruled. Plaintiff allowed an exception.

Mr. HELLENTHAL.—Answer the question.

(Testimony of B. D. Stuart.)

A. The Colorado claim platted from the surveyor general's office notes, beginning with Corner No. 5, which is presumed to be identical with Corner of the Last Chance Placer No. 3, I believe, Survey No. 142, lies indicated by the green lines upon exhibit 7.

Q. How many feet would it be from the northeasterly corner of the Colorado claim thus located to the point where the northerly side line of the Colorado would intersect a line extended from the line 5–6 of the Lotta as the stakes are found upon the ground?

Judge WINN.—We make the same objection. It is incompetent, irrelevant and immaterial and is not proper subject matter of rebuttal.

Objection overruled. Plaintiff allowed an exception.

A. I understand that distance—yes. The distance from the northeast corner of the Colorado is platted, as I have explained, to the line of the Lotta as indicated on the ground, by the stakes on the ground, extended southeasterly, measured from corner Number 5 perpendicularly to that line is 322 feet.

Q. What is the distance from the point where the northerly side line of the Colorado intersects the line to which you have just testified, being an extension of 5–6 as found upon the ground of the Lotta—to corner No. 5 of the Lotta?

A. The distance scales 390 feet.

Q. What is the distance from the Corner No. 3 of the Lotta to point where a line drawn from 2 to 3 of the Lotta would intersect [1439] the Colorado?

(Testimony of B. D. Stuart.)

Same objection. Objection overruled. Plaintiff allowed an exception.

A. The distance from Corner No. 3 of the Lotta on the ground measured along an extension of the line 2–3 of the Lotta claim, as indicated by the stakes on the ground, to a point where such line would intersect the north side line of the Colorado as platted according to the patent notes, as I have already explained, would be as near as I can scale it, about 530 feet.

Q. What would be the distance, now, from Corner No. 5 of the Lotta as platted by you on this map in green to a point on the northerly side line of the Colorado, if the southerly side line of the Lotta as thus platted by you were extended?

Same objection. Objection overruled. Plaintiff allowed an extension.

A. The distance would be, as near as I can scale it, 574 feet.

Q. I hand you here a Notice of Location—

Mr. HELLENTHAL.—I ask that this Notice of Location of the Colorado be marked as Defendant's Exhibit 28.

Judge WINN.—We object to it as incompetent, irrelevant and immaterial to prove any issues in the case, for the reason that the Colorado lode claim is conceded to have gone to patent.

Objection overruled. Plaintiff allowed an exception.

The Notice of Location is admitted as Defendant's Exhibit 28.

(Testimony of B. D. Stuart.)

Q. I hand you here what is marked Defendant's Exhibit No. 28, which purports to be a location notice of the Colorado and ask you to look at it and state where the Colorado would be platted upon the ground if platted in accordance with those [1440] notes.

A. The courses and distances seem to be practically the same. I notice one or two slight differences between these notes and the patent notes.

Q. They are practically the same.

A. Yes, they are practically the same. The line 5–6 in the patent notes is 1474 feet long and in this it is 1478; there seems to have been an approximation. It is described as starting at the same point, Corner No. 3 of Survey No. 142, the same point described in the patent notes, being Corner No. 5 of the Colorado. Otherwise it would plat in practically the same way except the jog which is shown in the southeasterly corner wouldn't appear—the east end line and the south side line would intersect at the point.

Q. Aside from that the claim would be platted practically as it is in accordance with the patent notes? A. Yes, sir.

Mr. HELLENTHAL.—I now offer in evidence the patent notes of the Colorado.

Judge WINN.—We object as incompetent, irrelevant and immaterial for any purpose in this case.

Objection overruled. Plaintiff allowed an exception.

They are admitted as Defendant's Exhibit 27.

(Testimony of B. D. Stuart.)

The WITNESS.—I notice another difference here. The east end line in the location notice seems to call for a distance of 500 feet, and it must be a mistake, because the notes call for the two side lines to be parallel, which they wouldn't be at that distance of 500 feet.

Q. Please take your pencil and mark on the exhibit here the number of feet it would be from Corner No. 5 of the Lotta as platted by you in green ink to the side line of the [1441] Colorado opposite that point—please mark there in figures the number of feet.

A. 574 feet—that is as near as I can scale it with this board.

Q. Now, mark in figures there the distance between Corner No. 5 of the Lotta as found upon the ground, as indicated by the stake that is found upon the ground, and the point where that southerly line would intersect the Colorado.

(Witness does so.)

Q. Come here please and write on this exhibit, somewhere along this green line of the Colorado, the words "Colorado platted according to patent notes," so we will know what they are.

(Witness does so.)

Q. Also mark on this plat the green line of the Lotta—Lotta according to the patent notes.

(Witness does so.)

Mr. HELLENTHAL.—That is all at this time, on that branch of the case.

(To follow the omission on page 778 of the origi-

(Testimony of B. D. Stuart.)

nal transcript [printed record, page 972] indicated by * * * , being part of the direct examination of Mr. Stuart, by Mr. Hellenthal.)

Q. How about the Canyon, did you survey that?

A. Yes, sir.

Q. What, if anything, did you find in the way of stakes in the Canyon claim?

Judge WINN.—We object to anything with reference to the Canyon location, for the reason that it appears affirmatively in this case from the defendant's evidence as testified to by Mr. Kinzie that the Canyon claim covers a large portion of the Oregon lode claim as located by Corbus and the location made by Corbus was made for this company and the location [1442] of the Canyon claim was also made for this company—it is an attempt to relocate a mining claim after it had been abandoned and had become forfeited, and it is against the law and makes the attempted location absolutely void and of no force and effect.

It is understood this objection applies to all evidence regarding the Canyon. Objection overruled and plaintiff allowed an exception.

Q. I hand you exhibit No. 25, which purports to be a notice of location of the Canyon lode claim, and ask you what, if anything, you did in the way of surveying the Canyon claim upon the ground as described in that notice.

A. I surveyed that claim from four of the corners.

Q. Where did you find them?

A. Found them as indicated in those red circles

(Testimony of B. D. Stuart.)

on exhibit 7, connected by means of a red line.

Q. The claim platted upon exhibit 7 in red, then, is the Canyon claim as described in that notice—is that right?

A. It is the Canyon claim as I found the stakes upon the ground.

Q. Which stakes did you find?

A. I found three stakes, on the southeasterly end line and the northwest corner.

Q. Please sit down here and mark that red line "Canyon Claim."

(Witness does so.)

Judge WINN.—We move to strike out all the evidence of the witness pertaining to the Canyon claim upon the additional ground. We object to its introduction for the reason that the location notice of the Canyon claim states that the Canyon claim is bounded on the easterly side or the northeasterly side by the Lotta lode claim and it appears affirmatively [1443] from the testimony of the witness Stuart that in none of these floating positions in which he has placed the Lotta lode claim will the Lotta be bounded on that side by the Canyon—it intersects and runs through the Lotta lode claim in any position they chose to put it upon this plat and map, testified to by this witness.

Mr. HELLENTHAL.—I expect we will have to lose that part of the Canyon that overlaps the Lotta.

Objection overruled and motion denied. Plaintiff allowed an exception on denial of motion to strike.

(Testimony of B. D. Stuart.)

(To follow the omission on page 785 of the original transcript [printed record, page 980] as indicated by * * * , being a continuation of the direct examination of Mr. B. D. Stuart, by Mr. Hellenthal.)

A. I now direct your attention to Plaintiff's Exhibit "N." I will ask you what, if anything, you did in the way of surveying the Humboldt dam.

A. I surveyed the Humboldt dam.

Q. You did that in connection with running your traverse lines? A. Yes, sir.

Q. You know where the Humboldt is situated upon the ground? A. I do.

Q. What is the distance from the Humboldt dam as established by you upon the ground to the corner, which is the common corner of the Crown Point and Keystone on the northerly end line of those two claims as platted on Plaintiff's Exhibit "N"—the distance as platted there? A. About 150 feet.

Q. How far would that corner be from the dam as located by [1444] you, if the end line of the Lotta as platted by you on exhibit 7 in green were extended in the direction of the Crown Point and the measurements allowed that are on the patent for the Crown Point, Keystone and those various intervening claims, approximately what would the distance be?

A. Why, judging from the distance that the Lotta claim in green on exhibit 7, shifted to the northwest from the claim as it is on the ground, it would bring it about 50 feet nearer to the creek at that point, which would make it about 90 feet to 100 feet to that

(Testimony of B. D. Stuart.)

line, as it would be.

Q. From 90 to 100 feet? A. Yes, sir.

(To follow the omission on page 798 of the original transcript [printed record, page 994] indicated by * * * , being part of the cross-examination of Mr. B. D. Stuart, by Judge Winn.)

Q. That is the one that you say there is no other place on the creek between certain points that you could place the claim other than it is?

A. Yes, I believe so, according to the notes in the patent for the Lotta.

Q. Now, when you first commenced testifying in this case, you went along the old wagon road and from different stations on that wagon road you made surveys to different points on Gold Creek?

A. No.

Q. What did you do then?

A. I ran a traverse along the road and down the creek and up the creek and closed on the road. From there I started station 93 on the map. [1445]

Q. You were over on the Basin road with your instruments? A. Part of the time.

Q. Who did you have down in the creek?

A. I went down in the creek myself.

Q. How did you get these points along the creek bank from the road?

A. I made stations that are marked on there, numbered from 107, the next one 124, the next one 125, the next one 130, and 131—those are the only stations I occupied with my instrument.

Q. Did you do anything on the road over here with

(Testimony of B. D. Stuart.)

reference to these stations with your instrument?

A. The traverse on the road was taken as I ran right down, measured down from 95 to 120, from there to 107 and up the creek to 124, then 125, 130 and 131, and then measured back to 93 where I started.

Q. Who assisted you in that?

A. I believe Mr. Hawley was with me and Dillman and Nunsucker.

Q. Hawley is also an engineer of the Treadwell people?

A. I don't know whether he is an engineer or not.

Q. A surveyor is he?

A. I don't *know education* or experience he has had.

Q. What was your object in making that survey?

A. To correctly show the creek with relation to the post on the ground and the road.

Q. You didn't measure the width of the creek there on the level of the water at that time?

A. Yes, sir.

Q. From bank to bank? A. Yes, sir. **[1446]**

Q. At those different stations? A. Yes, sir.

Q. Did you measure it at any other place besides those different stations you have just mentioned while you were making this survey?

A. I located the points indicated by small red circles on each bank of the creek and then at each of those points I had the men measure across the creek and tell me the width of it at those points.

Q. Did you measure the bed of the creek at the

(Testimony of B. D. Stuart.)

edge of the water? A. Yes, at the water level.

Q. What stage of water was there in Gold Creek at that time? A. An average stage—a fall stage.

Q. A kind of medium stage?

A. I don't know, it was somewhat lower than it is now.

Q. It was somewhat lower last fall than it is now?

A. Yes, but there was a pretty good flow of water in the creek at that time.

Q. You did measure the creek on a level with the water at each one of those points you have a station?

A. Yes, not to the inch, but I measured it within a foot.

Q. How did you measure it, with a tape?

A. Yes, sir; I had those points located on the bank of the creek and we estimated the distance across the creek.

Q. You didn't measure across the creek with a tape, accurately?

A. No, I had the men call to me what the width was, at the point where they measured to.

Q. What the width of what was?

A. Of the creek at the water level. [1447]

Q. How would they know the width of it—Guess at it? A. No, they would estimate it.

Q. That is another way of estimating it?

A. It depends on the party. Some parties are better guessers than others. I think it is easy to tell whether the creek is 5, 10, 15 or 20 feet wide from looking at it.

Q. Then, you didn't take any tape or instrument

(Testimony of B. D. Stuart.)

to measure it? A. No.

Q. Now, your main object in doing that was to properly sketch in the creek, to better sketch in the creek as it crossed the Lotta claim?

A. That was my idea, to get it as correctly with respect to the posts on the ground as I could, with relation to the road.

Q. You didn't pay any particular attention to the width of the creek—you took the points along there and the creek is sketched in as surveyors usually sketch in creeks, where they have the amount of information *you, or* sometimes less?

A. I don't know the custom of surveyors generally—it was done as closely as I could do it.

Q. Did you ever serve in the capacity of a deputy United States mineral surveyor or deputy United States surveyor?

A. I never had a commission but I have done a good deal of that work.

Q. Did you ever survey for mining claims and submit your survey to the surveyor general for patent, etc.? A. Yes, sir.

Q. About how much of that work have you done?

A. For the greater part of three years, while I was with the Federal Company—during the course of three years. [1448]

Q. Were you deputy United States surveyor?

A. I was not; no, sir.

Q. Under your law there you could make surveys for patent whether you were a deputy or not?

A. The notes were obtained sometimes by other parties and I had the position of checking over those

(Testimony of B. D. Stuart.)

and correcting them, and if they were sent back from the surveyor general's office, I had the position of checking them through again.

Q. Did you ever submit to any official an official map for a patent in all your surveying, wherein you would simply commence at a corner post and run down across a creek and make a call to the creek and continue on across and survey around the claim and make a corner as you come back as you have indicated you did on the Lotta—did you ever submit any such map to an official?

A. No, that is only done by the mineral surveyor himself.

Q. Do you know anything about surveying for a patent, as to whether or not if you were making a survey for a mining claim for patent, anywhere in the United States, that they would accept a map or plat of your survey if you tied it up to no other monuments except a call to a creek or such object as you might cross that you have to call to under the United States statute?

A. I don't know whether they would accept it or not.

Q. You know, do you not, that there will not be any survey accepted anywhere for patent unless you tie that claim up to some permanent monument, other than making calls to natural objects such as creeks, etc., when you cross it?

A. I know that is the regulation now—that is, they have to tie to either the corners of the public land survey or to some mineral monument which is es-

(Testimony of B. D. Stuart.)

tablished. [1449]

Q. And you never have known a time in your career as a surveyor that any surveys would be accepted unless they were tied up in that way?

A. The regulations require that.

Q. Now, then, when you testified to the Court here then that you conceived these calls to Gold Creek as ties, you didn't mean that they were such ties as would be accepted by any public official who would pass upon a survey for patent, did you?

A. I think they might be accepted under certain conditions.

Q. Where? Under what conditions?

A. If there were no others there.

Q. You just now said that all you ever found out about this, in accepting surveys for mining claims that they never will accept it unless you tie it to some natural object or monument other than giving calls to creeks you cross?

A. If I understand your question—I don't know whether I understood the former question—if the survey was just being originally made for the first time, such ties alone without any other ties would not be accepted; no, sir.

Q. Now, when you make calls to a creek it is done principally for topographical purposes?

A. I don't know what the purpose of the land office is in requiring them—I only know it is required; that is all.

Q. But you do know that that is not considered in its proper sense a tie?

(Testimony of B. D. Stuart.)

A. I don't know how they consider it; no, sir.

Q. Now, then, as a surveyor I will ask you which would you consider the most certainty, where a claim is tied up to some United States monument, where you could check from the monument [1450] and retrace your line and find the stake, or if you find the stake you could retrace to your monument—would you consider that a matter of more certainty than you would a simple call to a creek or side line of a claim, if you surveyed it?

A. From what I know and my experience with mineral monument ties, I would say that in a great number of cases calls to the creek would be much more accurate than the mineral monument connection.

Q. The mineral monument is built there and don't move nor change, does it—it is supposed to be a permanent object?

A. It is supposed to be—they are not, always.

Q. Have you ever seen the United States monument Number 2 up here that has been tied up to so often with those claims? A. Yes, sir.

Q. That doesn't show any indications of having been moved, does it? A. No.

Q. What sort of a monument is it, as you remember?

A. It is situated on the summit of a small ridge in Silver Bow Basin beyond what I think is known as the Nowell placer and consists of a large amount of rock and a post, quite a large post—I don't know the exact dimensions of it. I should say eight or ten

(Testimony of B. D. Stuart.)

inches square, perhaps, and it is so tall that a person cannot sight up over it—you can scarcely stand on the tip of your toes and reach the top of the monument.

Q. It is a pretty permanent looking object?

A. It is a pretty permanent looking object; yes, sir.

Q. You don't know when it was built or who put it there? [1451] A. No.

Q. Don't you know who put it there from an examination of the notes in the surveyor general's office? A. No, sir.

Q. I will ask you if you do not know that George W. Garside established that point?

A. I never heard it, no.

Q. Now, of course, if a creek didn't change its course any, remained always in the same place and you knew where a few stakes of the claim were, then a tie up there to the creek might help out?

A. It certainly would.

Q. In a call to a creek, when you commence at a post and run down to the creek, do you take the centre of the creek or either one of the banks?

A. The centre of the creek.

Q. You know from the surveys you have made up here in the Basin—take Plaintiff's Exhibit "N" in this case—you know clear on up above the Golden Fleece claim,—from there on up the Perseverance, up above the Golden Fleece and then off to the southeast of this Lotta group of claims, that it is patented for a mile or so, the claims are?

(Testimony of B. D. Stuart.)

Objected to as immaterial. Objection overruled. Defendant allowed an exception.

A. Only from the maps I have seen. I don't know how far they extend or anything about that.

Q. You must have passed four or five weeks up here in the Basin surveying and I understood you to say a while ago that you didn't put in all that time on the Ebner group,—you were surveying on some other property up there? [1452]

A. I didn't spend all my time on the Ebner property, no, sir.

Q. Did you spend part of the time on the company's property, on the Alaska-Juneau Company's property? A. Yes, sir.

Q. Where does their property lie with reference to this group of Lotta claims on exhibit "N"?

A. Northeast.

Q. And they extend on up,—how far up from the Lotta group of patented claims?

A. I should say it was a couple of miles around the road.

Q. You say you never had any occasion to make a survey of the Last Chance property which is one that the Colorado and Idaho are tied up to?

A. No; I never did except for that corner. I didn't have to, and the corner I referred to this morning, Corner No. 3 of Survey No. 142, I never done any surveying there, didn't know anything about it that way.

Q. The principal part of your time was put in to find some place on Gold Creek that you might locate

(Testimony of B. D. Stuart.)

the Lotta patented claim, so that you could get the dam of the defendant company off of that claim, wasn't it?

A. Not at all. I had no interest in that whatever.

Q. I believe you located the Lotta claim according to about three or four different plans the other day on these maps and exhibits belonging to the defendant company and which have been offered in evidence. You first take it, I think, and locate it as we claim it is and you describe the number of stakes you found on the ground—now, according to the location, the way we claim the Lotta is and the way Mr. Hill and Mr. Wettrick have testified about it—I see you have [1453] sketched in Gold Creek—now, how far did you find that corner No. 2 of the Lotta claim according to this sketch is from Gold Creek?

A. I think I testified in direct examination that it was about 80 feet.

Q. Do you know how far it calls in the field-notes and the notes that are in the patent? A. Yes, sir.

Q. How far?

A. The patent calls for it as being 40 feet and the field-notes 50.

Q. And you found it to be about 80?

A. Yes, sir.

Q. In that respect the survey differs from the notes in the patent? A. It does; yes, sir.

Q. Now, this matter of putting the creek on, in any of these claims that you have testified concerning, is a matter of more or less sketching?

A. Very little when you have as many points as

(Testimony of B. D. Stuart.)

there are located there. I might further state in that connection that I located the points; I located—wherever there was any change in the course of the creek, any material change, I located my point, principally at those points in the creek and where the creek changed its course I didn't locate points between those points where the course of the creek was crooked.

Q. How wide did you find the creek where the black lines here crossed the creek on the Lotta claim as you have platted it in on this plat, as we claim it to be? [1454] A. About 15 feet approximately.

Q. How wide did you find the creek down where your dam was put in?

A. About 20 feet, that is, measured normally to the direction of the current.

Q. And how wide is your dam across there, do you know—the length of the dam across the creek—I mean from one end of the dam to the other as you built it in the creek bed?

A. The dam proper across the creek is about 25 feet long.

Q. What do you mean by the dam proper?

A. Where the dam is across the water.

Q. But the whole structure I mean of your dam?

A. There is an abutment that extends to the northwest which is used as an anchorage for the dam proper. There is a large boulder just above where the word "dam" is written—that would be indicated on the map just above where the word dam is written, to which that end of the dam is anchored and the

(Testimony of B. D. Stuart.)

upper portions of the dam are anchored behind that dam to extend about to the point marked on the map 107—the dam is located diagonally with the canyon—it is practically parallel with the general course of the creek above.

Q. The whole structure is 70 feet across there?

A. About 65 feet.

Q. And that is in the canyon down the creek?

A. Yes, sir.

Q. Now, here is a map I desire to call your attention to which Mr. Kinzie identified—I offered it in evidence while he was on the witness-stand—it is attached to the answer, the defendant company's answer in 803–A. Did you have anything to do with the making of that map—I refer to Plaintiff's [1455] Exhibit "II"?

A. I never saw it before; no, sir.

Mr. HELLENTHAL.—I will now offer in evidence the chart which has been marked Defendant's Exhibit No. 6 for Identification. It is admitted as Defendant's Exhibit Number 6.

Mr. HELLENTHAL.—Also the chart marked Defendant's Exhibit No. 7 for Identification. It is admitted as Defendant's Exhibit No. 7.

Mr. HELLENTHAL.—Also the chart marked for Identification #11. It is admitted as Defendant's Exhibit No. 11.

Q. I will ask you to take that little map I handed you and we will go to the Defendant's Answer in 803–A and just casually look at the two maps, that little one and the large map Defendant's Ex. 11, and

(Testimony of B. D. Stuart.)

see if you do not think that one is the same as the other, altho one is made on a larger scale?

A. Well, in a general way they are similar; yes, sir—I wouldn't care to testify that they are the same in particulars.

Q. You see the Lotta claim on that map you have in your hand, attached to the answer in 803–A?

A. Yes, sir.

Q. I will ask you how the creek is sketched in on the Lotta claim in that map with respect to Corner No. 2, in the one you have in your hand, how is it sketched in on that, exhibit "II"?

A. Where it crosses the Lotta line as shown on exhibit "II" the creek passes apparently through the northeast corner.

Q. Give the distance with respect to the corner.

A. I will say nearer to the northwest corner considerably than it is to the southwest—it has no scale.

Q. That Corner No. 2 is sketched in correctly there? [1456] A. Yes, I said that.

Q. Could you by any means on that exhibit "II," could you tell about how the creek was sketched and how the Lotta claim was sketched in on this exhibit?

A. I don't know anything about how this map was made—I didn't make it and didn't have anything to do with it.

Q. You were here and heard the testimony of Mr. Wettrick and Mr. Hill and Mr. Ebner and Mr. Webster, did you not? A. I thing I did, most of it.

Q. You have been in the courthouse almost continuously since the commencement of this trial?

(Testimony of B. D. Stuart.)

A. A large portion of the time.

Q. I want to ask you to take our Plaintiff's Exhibit "N," and taking it for granted that Mr. Webster testified that he had seen Garside set this stake, at the intersection of the Webster Millsite, southwest side line of that millsite, where it intersects the upper end line of the Taku lode and also that he knew where the stake No. 2 and 6 is, which forms a common end stake of the Crown Point and the Keystone lode claims—now, considering that those stakes are there and were set there by Garside upon his survey, I will ask you if, taking into consideration also Mr. Hill and Mr. Wettrick's testimony about the call from one of those corners to the Ebner mill—I will ask you if you ever took into consideration those points being established as I have indicated and then took the notes of the patent or the patent field-notes of the survey which contains the Lotta lode claim in it and made any survey down or up the common side line of that group of claims?

A. I don't believe I thoroughly understand what you are trying to get at. [1457]

Q. Taking into consideration that Webster testified truthfully about this stake I have indicated to you on one of the side lines of that millsite and where it intersects one of the end lines of this group of claims upon which the Lotta is patented—you heard him testify about another stake further on which he saw Garside set?

A. No, I didn't hear that testimony—I didn't catch it if I did—I don't remember hearing that; I

(Testimony of B. D. Stuart.)

was either out of the room or didn't catch it at the time.

Q. I will hand you our exhibit "B," which is a certified copy of the official map which the Lotta was patented upon and the other group of claims with it, and I will ask you if in your surveys up on this property you ever run along the common end line of that group of claims, their common end line?

A. I never ran it out, I located some points on it—that is, I never ran right along the line and ran it out—I located some points that were supposed to be on that line.

Q. You found what we claim to be corner post No. 6 of the Lotta on the ground as Mr. Hill testified?

A. Yes, as indicated on the defendant's exhibit.

Q. There is no difference between you and Mr. Hill and Mr. Wettrick as to where that is located?

A. I have never checked it up on the map but in a general way it is the same.

Q. Have you checked up the courses and distances on Plaintiff's Exhibit "N" with some of your courses and distances on your exhibit?

A. No, I did not—in a general way I noticed they were about—

Q. You didn't find any difference?

A. Nothing material, no. [1458]

Q. Your length of the Lotta claim is practically the same? A. Yes, sir.

Q. And the length of the end lines is practically the same?

A. I believe they are similar; yes, sir.

(Testimony of B. D. Stuart.)

Q. You found what you call No. 1 stake of the Lotta on the ground—what has been referred to as Corner No. 1?

A. Yes, marked for Corner No. 1 of the Etta.

Q. Did you make any further survey for the common end line of the Lotta, Keystone and Crown Point?

A. I located what is supposed to be that intersection corner you have mentioned.

Q. Of the Webster Millsite?

A. It is marked for the corner of the lode.

Q. Did you go any further up that common end line to run out the exterior boundary lines of those claims included in this official plat exhibit "B"?

A. I located what I presumed to be the northeast corner of the Crown Point lode.

Q. You know there is a tie from that corner to the United States monument Number 2?

A. I believe it is given in the patent notes from that corner, is supposed to be, to the mineral monument.

Q. Did you run out that tie at all to the U. S. monument?

A. I ran a traverse which connected with the mineral monument and connected in with that post on the ground also.

Q. How did you find your distance there compared with the distance in the patent field-notes?

A. It was something over 100 feet shorter on the ground than the patent notes called for.

(Testimony of B. D. Stuart.)

Q. That is, Garside's was wrong? A. Yes, sir.

[1459]

Q. About 100 feet?

A. Something over 100 feet, yes.

Q. You know that all those claims you went over up there for the defendant company and all the claims of the Ebner Company so far as you have examined them, where there is any tie to a natural monument or object, they are all tied up to that United States monument?

A. I don't know that I have looked that up enough to say that in a general way.

Q. If you made any surveys up there you undoubtedly looked to see whether or not they complied with the rules of the surveyor general's office and were tied up to something?

A. In one or two cases I did; yes, sir.

Q. Do you know what the rule is now and has been for the last two or three years here in making surveys for mineral claims as to how you have to connect them up, make a connection with the mineral monument yourself?

A. I am acquainted with that rule.

Q. When you went up there to survey, wasn't that one of the first things you looked for—any claim you went upon or any group of claims—if you wouldn't look to see whether they were bound up to some natural object?

A. No, my work was to locate the points on the ground—to locate them as they are on the ground.

Q. Would you consider that a tie to some monu-

(Testimony of B. D. Stuart.)

ment, which is a United States monument, and all those claims tied up to it, wouldn't that be of assistance to you?

A. It would be of assistance to me in determining the relation of those claims to the monument, but not necessarily one to the other.

Q. Did you hear Mr. Hill's and Mr. Wettrick's testimony as to [1460] the difference they found in the distance between that Crown Point stake and the U. S. monument from what Garside's was?

A. Yes.

Q. How much did you and they differ in that?

A. I believe that we differ in course—I don't remember just what they gave—I believe we differ in courses somewhat, but not a great deal in distance.

Q. Now, then, you know that in this copy of the official plat under which the Lotta and those other claims are patented, that there is a tie made from one of that group of claims to this U. S. monument, don't you?

A. There seems to be a tie of that kind; yes, sir.

Q. And that is from what corner of what claim?

A. From the northeast corner of the Crown Point.

Q. The same as it is on exhibit "N," that is the tie —that is the tie that is marked there?

A. Yes, the same.

Q. Don't you think that in taking the field-notes of the survey of which the plat you hold in your hand is the official plat, that in order to locate these claims upon the ground as they should be and ought to be—

(Testimony of B. D. Stuart.)

don't you think if you were conscientiously trying to do that, that you would look for all the monuments that are found in connection with this entire group of claims and also would look up carefully and see what natural object or monument that any of them was tied up to in the Basin, before you undertook to locate them particularly?

A. You mean to relocate them as they substantially were originally?

Q. Yes. [1461]

A. I would not undertake to do that.

Q. You would not undertake to do that at all?

A. No.

Q. Don't you consider that the original corners as they were set by the surveyor who made the survey for patent as found upon the ground, that they would be of some assistance to you?

A. It might be of some assistance—it depends upon conditions.

Q. Suppose you go on the ground and you find by the monuments and corner posts that were set there by the surveyor general—suppose the courses and distances are all out of sort and out of joint—which one is of the most certainty the courses and distances or the monuments found on the ground?

Objected to; objection sustained.

By the COURT.—The monuments prevail.

Q. Did you make any effort in this case to go around the exterior boundary lines of this group of claims that were all patented together, including the Lotta, to find where the original monuments were placed?

(Testimony of B. D. Stuart.)

A. No, I don't know that I made any great effort in the survey; I picked up those that were within the limit of my traverse and the corners of the Lotta claim, the posts that were on the ground marked as being the Lotta—those are the ones I was particularly anxious to get and get right.

Q. Now, I will ask you this question—if it should appear in this case that the corner that is at the intersection of the southwest side line of the Webster Millsite, where that intersects the northeasterly end line of the Taku, as shown to be just where Garside said it was when he made the survey, as to whether or not that would have been any assistance [1462] to you in locating this Lotta claim upon the ground?

Objected to; objection overruled; defendant allowed an exception.

A. It might have been of indirect assistance, if I knew that that corner was the corner, which I did not know—it is marked for the corner of the ropeway.

Q. Let us take for granted that it has been established in this case—that that corner is just where Garside; and also the other corner, what is called 2–6, which is a common corner post of the Crown Point and the Keystone lode claims has been established; and suppose you take the field-notes or the notes as indicated in the patent and then run on down towards Corner No. 1 of the Lotta, and you found that all of those distances as they appear in the field-notes and as they appear in the patent and the actual measurement made upon the ground tally or practically tally—what would you say as to whether or not that would be a better way to locate the Lotta claim

(Testimony of B. D. Stuart.)

than the way you have undertaken to locate it?

A. All I would conclude from such a set of circumstances as that would be that the work was probably correctly done in the first place, providing the courses and distances between those two corners as they are on the ground agreed with the patent notes; if they did not, I would consider the work had been incorrectly done, but as I located those two corners on the ground the courses do not agree with the patent notes.

Q. If you take as you say a compass and turn off—we will call it variation—in some of the geodetic surveys they leave out the matter of declination and call that variation—you say if you turn off that variation of 30° and take a compass [1463] and put it on any one of those corner posts of the Lotta and then take Garside's courses and distances, you practically run out the Lotta claim as we contend it is on the ground?

A. If you take a compass and assume that declination and it should work out correctly, it would probably retrace that Lotta, yes, sir.

Q. Now, suppose we would take this declination or variation, whatever you term it, and take Garside's courses and distances and run off say from this common end line, corner post of the Crown Point and Keystone, 2–6 and proceed down to that until you got down to Corner No. 1 of the Lotta and then found that those distances all practically jibed in with Garsides and with the patent, then what would you have to say about it?

(Testimony of B. D. Stuart.)

A. I would say the survey was properly made with the compass.

Q. You would say it was made with a compass?

A. Yes, sir, under the conditions as I know it.

Q. Now, a transit is made up of what—describe to the Court?

Q. You first have on top of it a telescope; a transit consists of a telescope, founded upon two vertical arms which are called the standards, in a position so that the horizontal axis of the telescope is perpendicular to those standards, usually of a vertical circle, which is attached to the standard or rather which is attached to the horizontal axis of the telescope, really the horizontal circle, by means of which horizontal angles are read; all mounted upon a tripod.

Q. Here I have a compass such as surveyors use—on top of that compass virtually there is mounted a telescope and a transit? [1464]

A. No, sir—there is a compass box on a transit, but it is not in any way connected with the telescope except in an indirect way.

Q. You have a compass and usually the compass is a part of that machine—the telescope, of course, is on top and above the compass?

A. It is a part of the instrument if you are using your compass to determine your meridian.

Q. If you bring a transit in here now, your telescope is mounted up above the compass, is it not?

A. There is a compass underneath, yes, but the way you asked the question, it might be inferred that the telescope was mounted in such a way that it

(Testimony of B. D. Stuart.)

formed a part of the compass.

Q. No, I didn't mean that—I had you name the different parts of a transit and you mention the telescope and then the compass and then another part down below you read the angles by.

A. Yes, horizontal angles, that is what the telescope is practically connected with.

Q. They are all there together, the compass and all together to make up that instrument?

A. Yes, sir; I want to qualify that by saying that the compass is only a part of the instrument, if you release the needle and use the compass as part of the instrument. If you don't use the compass as part of the instrument, it is separate and cuts no figure.

Q. You said something yesterday to Mr. Hellenthal about taking the compass and you could turn off a variation of 30° as indicated by Garside and put it on one of those posts found on the ground, if it is the correct post, and take Garside's [**1465**] corners and run around the claim—take this compass and illustrate what you meant by that—there is the needle, let us see what you meant by that?

A. There doesn't seem to be any declination or variation plat upon this instrument. The way this compass is built I should say it is now pointing to north—

Q. That wouldn't be the true north?

A. It would be the magnetic north.

Q. Turn off as you indicated yesterday the 30° Garside ran on, the variation, and drop your needle on that and set the machine the way you set it, the

(Testimony of B. D. Stuart.)

way you described to Mr. Hellenthal you ran off these claims?

A. You can't set off the declination as far as I can see on this compass.

Q. You can't set off 30° there?

A. The way it is there now, the sights are pointing practically north and south—that would be north and south assuming that the declination is 30°; assuming that it is 32–30 it would like about that way.

Q. Take 30° as Garside made the surveys, by turning it off, you mean putting this on one of the corners and setting your instrument there—now taking his angles through these slides you could run off and get the same property we contend is in the original claim?

A. I would say in a case like that there might be a good deal of error introduced in such a line 1500 feet long from the fact that the declination varies with the place.

Q. Suppose you were going to run that off with a transit, as I understand you take the due north and south on the transit—you described that to the Court this morning—suppose you [**1466**] take your transit, the change consists of a telescope which you use instead of using these slides on the compass?

A. Yes, sir.

Q. They are substituted for that, are they not?

A. I wouldn't say they are a substitute, but when you use the compass on the transit then they are substituted—when you use the compass to determine the meridian; otherwise they are not.

Q. Now, take the telescope of your transit and

(Testimony of B. D. Stuart.)

there is a hair in there—the same as this fine wire is here in the sight of your telescope?

A. It performs the same function.

Q. And you look through that and that is where you always put your tack on the post—it is where that hair or wire in the telescope places it—that is where you place the tack in the top of the post?

A. I don't understand that—it depends what I am doing.

Q. When you make a survey you frequently put a tack in the top of a post? A. Yes, sir.

Q. That is on the sight that your hair in the telescope presents it?

A. I think so, yes, if I understand the question.

Q. That is a little bit more accurate than looking through this slit on the compass?

A. Yes, sir, very much more accurate.

Q. (By the COURT.) What is the length of that telescope?

A. On mine it is 8 or 10 inches long—I have my transit at the hotel.

Q. Suppose you turn off and shut down at a variance of 30°, [1467] such as Garside made this survey on, and then take your transit and use it instead of your compass and sight it through your telescope instead of sighting through these slits on the compass, I want to understand if that is not a fact that then commencing at one of these corner posts you run virtually over the same ground we contend is in the Lotta?

A. Yes, I think the simple way to express it, if I set out from one corner of the Lotta as it is on the

(Testimony of B. D. Stuart.)

ground and employ my compass as a means of obtaining the meridian and assume a declination such as Garside gives in his notes and turn the angle asked for in his notes, I would practically retrace the line of the Lotta as it is upon the ground, that is, always assuming that the compass is used as a means of obtaining the meridian instead of an astronomical observation.

Q. If Garside used a transit in making these surveys up here from what you have found out, you would say he made some mistakes up there, wouldn't you?

A. I don't know whether he did or not, I wouldn't say; if the stakes that are on the ground are as they were, he made some mistakes evidently.

Q. You know he made a mistake in giving the right length of the Lotta claim?

A. Yes, if the stakes on the ground are as they were and if the Lotta is where we say it is, he made a mistake in his distance of the call to the creek, a very considerable one.

Q. And so far then as you have found out in regard to his call from the post No. 2 down to the creek, you find that wrong or practically the same—his call there is out of joint?

A. The distance measured from the point as I have determined it from Corner No. 2 to the creek, corner No. 2 of the Lotta [1468] to the creek is about 40 feet longer than as called for in the patent.

Q. Do you know in Alaska what has been considered the proper amount to look for of variation per

(Testimony of B. D. Stuart.)

annum with the needle, at this place?

A. Only from what I have learned by looking at the chart of the Coast & Geodetic Survey of this vicinity.

Q. I have one here of Douglass Island, etc., Gastineau Channel—1897—that is one of those plats that you refer to? A. Yes, sir.

Q. I wish you would look on that plat and see what in 1897 they give as a variation.

Objected to as hearsay.

By the COURT.—It purports to be published by authority of the Government, on its face?

A. Yes, sir.

Objection overruled. Defendant allowed an exception.

Q. What does that state the variation was in 1897?

A. There are two different variations given here.

Q. Both the same?

A. Not suite, no, sir.

Q. At different places? A. At different places.

Q. At different places on the ground supposed to be covered in that survey?

A. Yes, sir—there is nothing giving it on the mainland over here—it is just on the island.

Q. Well, what is it?

Objected to as immaterial what it is on the island. Objection overruled. Defendant allowed an exception.

A. The variation at the northwest corner of the island was [1469] 30° and ½ east in 1897 and the annual increase 2′.

(Testimony of B. D. Stuart.)

Q. Over on the other side?

A. The southeast corner it was 30° and 2/3 with an annual increase of 2′ (two minutes).

The chart is marked for identification Plaintiff's exhibit "KK."

Q. You know that a great many surveys of townships through the different states of the Union, government surveys at that, have been made simply by using a compass? A. No, I do not know that.

Q. Do you remember there is a time they used to survey with what they call a Jacob staff, had a staff they stuck down in the ground and used that to measure courses and distances?

A. That is too long ago for me.

Q. I suppose in your education you would go back to see the improvement of instruments in connection with your trade or profession?

A. I have heard something in regard to it.

Q. Haven't you seen that in your studies and don't you know as a matter of fact that it is part of your education that when they first commenced making surveys they never knew anything about a transit?

A. I don't know when they began making surveys.

Q. How far does your learning take you in your studies? A. I wouldn't undertake to say.

Q. Don't they tell you how this transit came into use and how it was an improvement over the compass in finding the actual meridians and actual north and south?

A. I don't know that it states that implicitly, that is self-evident, though. [1470]

(Testimony of B. D. Stuart.)

Q. Do you want to say that you have not gone back far enough in the history of your profession and trade to know from time to time the improvements of the instruments and mechanical devices, etc., that were used by surveyors in making surveys?

A. Oh, no, I wouldn't want to say that I wouldn't know that they were made from time to time—I know they were, but as to exactly when the transit superseded the compass, I don't remember of having read.

Q. If it wasn't for the local effect in the way of minerals, pieces of steel, etc., that of course deflect your needle and influence it more or less, if it wasn't for those local influences, you could take a compass, providing its sight was as good as that in your telescope, you could run a true line by a compass the same as you could with any other instrument?

A. Not the same, no, sir.

Q. What would make it different?

A. Of course, it wouldn't be as accurate; in the first, at any given point there is what they call a diurnal variation or declination which sometimes amounts to as much as 15 minutes at the same point, on the same day at different times in the day.

Q. If it wasn't for your needle—

A. That would affect your line if you were running by a needle.

Q. And would affect the needle, make it vary from the true north more or less? A. Yes, sir.

Q. Outside of those things—you could take a compass and the needle always points to the magnetic north, unless there is some local influence? [1471]

(Testimony of B. D. Stuart.)

A. I believe it does.

Q. And that would be just so many degrees from the real north?

A. It would be if you want to assume that all of the influences which affect the fluctuation of the needle are eradicated.

Q. I will call your attention to Plaintiff's Exhibit "N" in this case and ask you if you were present at the time Mr. Wettrick and Mr. Hill gave their testimony, in which they testified concerning the tie that is made in this official survey and of which the Lotta is one of the group that was patented, that there is a call from a certain corner on the end lines of these claims to the Ebner mill—did you hear that testimony? A. Yes, sir.

Q. Now, suppose you float the Lotta claim up, if you want to place it on your map here, and put it above where we claim the Lotta is—how is that going to affect these measurements, etc., along the common end line of this whole group of claims?

A. If you change your question I can answer it better—I don't want to float it up.

Q. You found a place that you thought it fits on Gold Creek? A. Yes, sir.

Q. And that takes it up how much further than we claim it is on the ground?

A. About 180 feet.

Q. You know the number of claims included in this official survey, of which the Lotta is one and you have done a whole lot of surveying up there—I will ask you, if the Lotta claim is located where you have fit it in on the creek, [1472] what effect, if any, is it

(Testimony of B. D. Stuart.)

going to have with those mining claims up there?

Objected to as calling for a legal conclusion.

Objection overruled. Defendant allowed an exception.

A. Well, if all the claims were moved in the same way, it would move the whole group of claims, otherwise the claim would overlap what is indicated as the Taku Gold & Silver.

Q. And you know that this group of claims described in this official plat, of which the Lotta is one, is surrounded on every side by surveyed claims and patented claims, long since patented?

A. I believe it is.

Q. Would you consider as a surveyor that if a surveyor was running the common end line, the northwesterly end line of this group of claims that are contained in that plat, the official plat of the survey, should make a call to what is called the Ebner mill, would you consider that of as much certainty as making a call to the creek?

A. For the particular claim in which the tie is called for I would, yes, sir.

Q. That official map or plat which is marked Plaintiff's Ex. "B" is one application for patent and the whole bunch of claims were patented together—do you understand that to be the case?

A. I don't know how they were patented.

Q. Haven't you read over the field-notes?

A. Yes, I have read over the field-notes.

Q. Don't you know they were all patented in one application and one survey?

(Testimony of B. D. Stuart.)

A. The various claims of the group are given separate survey **[1473]** numbers—I would consider they were distinct survey numbers, and I would consider each claim had a distinct survey judging from that fact.

Q. Have you read over the field-notes and all the descriptive parts of that survey?

A. I believe I have.

Q. Don't you know in that description, that descriptive part, that it takes the Lotta claim and gives its boundary lines and states it is bounded on one side by the Taku lode?

A. I don't remember in detail about that.

Q. You testified yesterday concerning this very same matter and read into the record in this case the boundaries of the Lotta claim at the request of Mr. Hellenthal?

A. I don't remember of testifying to that.

Q. I will ask you this question; Didn't you testify to Mr. Hellenthal yesterday that you were well acquainted with the field-notes of the survey under which the Lotta and this group of claims were patented?

A. I think I read them over, and was pretty well familiar with them—I don't remember all the details, just what was said and what was not, in particular.

Q. Do you remember this portion in the field-notes—I think it has been read in evidence in this case—that it gives a description of the Lotta claim and the other claims in that survey and then stated that the Lotta claim was bounded this way, thus and

(Testimony of B. D. Stuart.)

so, and gave one side of it—I think the Taku lode?

A. I think I remember that, yes, sir.

Q. Now, I will ask you to refer to this exhibit "N" and take this group of patented claims set forth in this certified copy [1474] there of the official plat, the Crown Point, Keystone, Taku and the Lotta—they form almost a square if this exhibit "N" is correct? A. Somewhere near a square.

Q. Now, then, if these claims were all surveyed the same time and you know they are all contained in the same patent with other claims—

A. They are contained in the notes of the patent—all the same patent.

Q. Would you consider a tie from that corner No. 2 of the Crown Point to the U. S. Government monument there would be somewhat of a tie of that whole group of claims?

A. I have mentioned they are, as indicating pretty closely where they lie, with relation to the rest.

Q. But you ran that line and found that line was longer than the one you measured?

A. I believe so, yes.

Q. Now, I will ask you if that is true, assuming that Garside's course was correct, that would throw the end lines of these claims all a little further to the northwest. A. Yes, to the northwest.

Q. Then, if we take it that the end line of these claims, the measurement is given properly and run on down to the Lotta, it would throw the Lotta a little bit further down the creek.

(Testimony of B. D. Stuart.)

A. If you consider the whole group is a solid square, it would tip out that way.

Q. Instead of putting it further up the creek?

A. Yes, assuming his tie to be correct.

Q. If it has been established in this case by Webster's testimony **[1475]** and other testimony that the two stakes I described to you a while ago, one of which is the intersection of one of the side-lines of the Webster Millsite with the Taku lode and the one marked 2 and 6, and is called the common corner post of the Crown Point and Keystone, provided they are established on the ground to be the posts set there, and also there is a tie from a corner, I think called Number 1 in the field-notes, a call we will say to the Ebner mill; now suppose the Ebner mill is in the same place now that it was when that survey was made, and then suppose we run on down from the corner 2 and 6, the common corner of the Crown Point and Keystone, and come on down about the same distance that Garside gives in the field-notes and patent, and we strike this corner which is the intersection of the Webster Millsite line and the upper end of the Taku, which is about the same distance that Garside gives it; come on down to another spot, a place that Garside says he makes a call over to the Ebner mill, we find that just about the same; continue on down, we measure off a distance about the same that Garside has given in the field-notes and appears in the patent, we find Corner No. 1 of the Lotta lode claim and that is in the same position it was when the survey was made, what would you say as to

(Testimony of B. D. Stuart.)

whether or not we have properly located the Lotta on the ground?

A. As the stakes are in the ground now?

Q. Yes.

A. According to the notes in the patent, it would not be correct.

Q. But, now, suppose we run those lines, turn off this variation and run it with the same courses and distances as **[1476]** Garside gives, on that variation set forth in the patent and come down and find those stakes in the same place I have indicated—what would you say as to whether or not the Lotta is not in the ground as we contend it is as determined by a compass survey?

A. I should say the courses now are all right, practically, within certain limits; of course, the end line of the Lotta as it is on the ground is 15 feet short, that is in 300 feet—it is not a trifle by any means.

Q. If the corner posts are there as Garside set them, and have never been moved, he has made a mistake in the distances? A. Yes, sir; he has.

Q. I will ask you this question, whether or not you would be governed by the monuments, etc., put on the ground by the surveyor who made the survey or would be governed by the courses and distances?

Objected to as a matter of law. Sustained.

Q. Now, I wish you would scale off the distances that you have upon your map from Corner No. 1 of the Lotta lode claim to the Ebner mill and then I wish you would scale it on Plaintiff's Exhibit "N," from corner No. 1 to the Ebner mill, and see if they are

(Testimony of B. D. Stuart.)

approximately the same?

A. Pretty close, yes, sir; within ten feet it scales.

Q. Do you know what the patent calls for, the distance—did you ever find that out from the notes in the patent?

A. The distance I should scale? No, I never figured that distance.

Q. Here is this certified copy of the plat which has a scale of 400 feet to the inch—I would ask you to take this certified copy, Exhibit "B," and scale off the distance from [1477] this corner No. 1 of the Lotta up to the mill as indicated on that?

Mr. HELLENTHAL.—The testimony in connection with the location of the Lotta by reference to any other subsequent surveys, the Taku, Keystone, Crown Point—let the record show that all goes in over our objection.

By the COURT.—It is so understood and exception noted.

A. It scales 490 feet.

Q. What does it scale on your map? A. 510.

Q. And what did it scale on the other? A. 500.

Q. 500 on ours? A. Yes, sir.

Q. You took the centre of the mill?

A. I took the centre of the mill in each case, yes, sir.

Q. This scale is four hundred feet to the inch in the patent? A. Yes, I took that scale.

Q. Now, I will asy you if in your endeavors to locate the Lotta claim on the ground, if you resorted to the field-notes of the Royal lode survey, which is

(Testimony of B. D. Stuart.)

marked on exhibit "N" Survey 238—did you resort to those field-notes in the plat?

A. In my endeavors to locate the claim upon the ground? I didn't attempt to locate it on the ground.

Q. Where did you locate it?

A. I didn't attempt to locate it on the ground.

Q. The Lotta claim?

A. No, sir; except as the stakes are located on the ground and I located the stakes. **[1478]**

Q. Suppose you had been called upon to locate this claim or to advise where it is on the ground—suppose there had not been any stakes on the ground at all of the Lotta, then what would you have resorted to to make the location of it?

A. I would have resorted to the patent notes, I think.

Q. You couldn't do anything just with the patent notes, unless it was tied up to something?

A. No, not unless it was tied up to something.

Q. Supposing there had not been any stakes on the Lotta claim, and you undertook to locate that claim, would you have looked into the field-notes and said, here is the place, so far to the creek, and another distance to the creek—would you use that or look for some monuments and some other ties on the ground?

A. I would probably look for some other ties in that connection, to see how they agreed one with the other, and if they did not agree one with the other, I would be careful how I proceeded from then on.

Q. You say you didn't attempt to locate the Lotta

(Testimony of B. D. Stuart.)

on the ground. What have you been attempting to do?

A. As I understand you, locating the Lotta on the ground would be setting stakes where it is supposed to be.

Q. You know there is a Lotta claim up there?

A. I know there is supposed to be.

Q. There is a patent granted to a claim called the Lotta? A. Yes, sir.

Q. Have you been trying to find out where that ground is that is in the patent, where it is on the ground up there—had that been your endeavor?

A. In connection with my field work my endeavors were to locate [1479] the stakes on the ground correctly as regards their position in reference to the creek, etc.

Q. Do you want the Court to understand that you contend the Lotta patented claim as a claim is anywhere else on the ground, except where we contend it is by these corner posts?

A. I haven't any contention at all—all I have done is to locate those things on the map and that is all I contend—that that map is correct.

Q. Where is the Lotta lode claim then?

A. That is something I don't know.

Q. Now, in your investigations up there, then, you never went over to the Royal survey or any of these subsequent surveys to see whether they tied up to any of the Lotta stakes or not, did you?

A. I went on to some of the other claims, yes, sir.

Q. Did you go to the Royal lode?

(Testimony of B. D. Stuart.)

A. I was on the Royal, yes, sir.

Q. Don't you know the lode line of the Royal lode is tied up to stake 5 of the Lotta, and then stake No. 5 of the Lotta is in turn tied up to a tunnel that is run on that claim?

A. I don't know that corner No. 5 is tied to any tunnel, no, sir.

Q. Do you know that there is any corner of the Royal lode claim that is tied to a tunnel?

By the COURT.—Is corner 3 tied?

A. Corner 3 is not tied in any of the Lotta notes, no—there is a tunnel on the Royal, but she is tied in the notes to a corner of the Royal.

Q. Don't they say that is a corner also of the Lotta?

A. I don't know whether the notes call for that or not.

Q. Did you hear the testimony of Mr. Hill and Mr. Wettrick on **[1480]** that point?

A. I believe I did; yes, sir.

Q. You know that they both testified that that corner of the Royal read in the Royal notes that it was a common corner of the Royal and Lotta?

A. I didn't find any corner marked for the Royal at all.

Q. I am asking you if you know what the field-notes of the Royal called for? A. I think I did.

Q. Now, do the field-notes of the survey of the Royal lode claim tie up the Royal lode claim in any wise or in any respect to any corner of the Lotta lode claim?

(Testimony of B. D. Stuart.)

Mr. SHACKLEFORD.—We object to any testimony with reference to the tying of the Lotta claim to a subsequent survey, for the reason that it is irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. I would like to refer to the notes. I wouldn't say from memory.

Q. You don't know whether that is the case or not?

A. I don't remember really whether it makes that corner or not.

Q. Look at exhibit "N" again—you see on the Royal lode what is called the old tunnel?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Hill and Mr. Wettrick in regard to the corner No. 3 of the Lotta and corner 1 which is the lode-line stake of the Royal lode, being indicated as a common corner?

A. I believe I heard that testimony, yes, sir.

Q. You don't know what the field-notes do show on that?

A. I wouldn't say from memory. **[1481]**

Q. If that is true and that corner in turn is tied up to a well-defined tunnel, an old tunnel, probably caved in some, would that have been any assistance to you in locating the Lotta claim on the ground where it ought to be and should be and where it was originally located when survey was made for patent?

A. With some provisions, yes, sir.

Q. Here is another survey over here, a survey of

(Testimony of B. D. Stuart.)

the Forrest lode claim—did you examine the field-notes of the Forrest? A. Yes, sir.

Q. You know there is a call made to a corner post which states that that is the intersection of the Forrest lode with the Lotta lode claim and you have found that stake, haven't you?

Mr. SHACKLEFORD.—We make the same objection to all this, also that it is argumentative.

Objection overruled. Defendant allowed an exception.

A. I found the corner that was marked corner 4 of the Forrest.

Q. You know that the field-notes of the Forrest and the Forrest lode survey says that it is at the intersection of that line of the Forrest with the side-line of the Lotta claim, don't you?

A. It doesn't say corner 4 of the Forrest is located there, no.

Q. It says the end line of the Forrest intersects the lower side line of the Lotta, just where this stake is—don't the field-notes of the Forrest show that?

Same objection; objection overruled. Defendant excepts.

A. I wouldn't say until I saw the notes. I don't know whether the field-notes call for a post at that point or not.

Q. It calls for the intersection—

A. It calls for the intersection of the lines, yes, sir.

Q. You don't know whether it states there is a post there? [1482] A. I don't remember that.

Q. If you were looking to locate the Lotta on the

(Testimony of B. D. Stuart.)

ground where it is in reality, would any data of that kind be of any assistance to you?

A. It might, and might not.

Q. As I understand it, you have platted in on your exhibit the Colorado lode claim from the field-notes in the patent, and it is indicated by this green line?

A. Yes, sir.

Q. And you measured it off, and found it to be approximately how many feet?

A. The notes call for 1,447. I believe it is.

Q. And the survey of the Colorado is tied up to a corner down here of one of the Last Chance surveys?

A. In the notes it is tied to that.

Q. And don't you know also in the notes of the Colorado that it is tied up on the easterly end to the Royal claim?

A. The Colorado? I believe it does mention the Royal claim, if I remember correctly.

Q. And you know that the Royal lode claim, survey 238–A, was a prior patent and prior survey to the survey made for the Colorado?

A. I believe so, yes.

Q. If there was not fourteen hundred and some odd feet in there, then the distance called for in the Colorado lode claim is a mistake, is it not?

A. It must be.

Q. You couldn't get any more ground than there was left unpatented in there, could you?

A. I don't know whether you could or not. [1483]

Q. If it is patented on both sides you know enough

(Testimony of B. D. Stuart.)

about surveying to know that you couldn't run a junior patent over a senior patent?

A. You could run it over and set the stakes, but I don't know whether you could get the ground or not.

Q. Did you ever take this commencement corner of the Colorado lode claim, which is also the common corner of one of the Last Chance surveys, it is so described in the Colorado survey—and have you ever run up the distance according to the field-notes in the patent of the Colorado, to find out what the actual distance is between the lower side line of the Royal and your commencement point of the survey of your Colorado?

A. I don't know whether I understand that.

By the COURT.—Did you ever find that stake up on the lower side of the Royal?

A. No, I searched for that a long time and never found that.

Q. You never found it on the Royal lode?

A. No.

Q. Did you ever take the field-notes of the Royal lode and go up there and attempt to locate the Royal lode on the ground? A. I never tried that.

Q. You know in the Colorado survey that a certain distance is given for the intersection of the upper side line of the Colorado with the lower side line of the Royal lode?

A. I think they are supposed to be identical—I think the upper end line of the Colorado is supposed to be on the lower side line of the Royal.

Q. Did you ever see whether or not any distance

(Testimony of B. D. Stuart.)

was given from Corner 5 to the place where the upper side line of the Colorado [1484] intersects the lower side line of the Royal lode?

A. I have noticed that—that is called for in the field-notes, yes, sir.

Q. Then, the Lotta being a prior survey to the Colorado and that distance given, would it be in that way tied up to the Lotta lode claim?

Same objection; objection overruled; defendant allowed an exception.

A. I should say it was tied to the post which is in the ground as corner No. 5 of the Lotta.

(To follow the omission indicated on page 808 of the original transcript [printed record, page 1005] by * * * , being a part of the redirect examination of Mr. B. D. Stuart, by Mr. Hellenthal.)

Q. If you start at the mill, located on the Taku Gold & Silver and run from the mill in accordance with your courses and distances given in the patent, would the lower side line of the Lotta be as indicated, between Corner 5 and 6, as indicated on the ground?

A. It would not, no, sir.

Q. Can you furnish a plat in the morning of that side line as it would fall? A. I can, yes, sir.

Q. Can you draw it on here?

A. Yes, I could.

Q. Would it take very long?

A. It would take a few minutes.

Mr. HELLENTHAL.—I will ask you to do that after I finish my examination. [1485]

Q. Now, what was the magnetic declination given

(Testimony of B. D. Stuart.)

in that government chart presented to you?

A. I believe as I remember that declination was given at the north part of the island as North 30 and ¾, something like that.

Q. What is the variation given?

A. East 30 and ¾ as I remember.

Q. What is the variation given?

A. The variation is given as 2 minutes per year.

Q. Assuming that the Government is right, would the declination as given in the patent survey or as given in the patent to the Lotta have been correct in 1887?

A. It would have been pretty close to it, it would have been very close to it. If it had been ten years earlier, it would be twenty minutes less, which would make it 20 minutes nearer the 30° than that given on the chart.

Q. How many minutes would it have been off?

A. Probably the average would be 30½ as given in 1887 on the Coast & Geodetic chart or survey and then a variation of two minutes for ten years would be 20 minutes, which would make it ten minutes off.

Q. Then Garside's variation was right within ten minutes in 87? A. According to that.

Q. Did you take the magnetic variation when you were up there making a survey last fall?

A. Yes, sir.

Q. What did you find it off?

A. 2° 30′ difference between what I obtained and what was given in Garside's notes.

(Testimony of B. D. Stuart.)

Q. Now, if the stakes of the Lotta now standing in the ground [1486] were set by a surveyor who adjusted his transit and found his true meridian by means of the compass and assuming the variation given in the patent, when were those stakes set?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

A. If they were correct, it would seem that they had been set—that is just judging from the data you give me—it would be since 97 because the difference that would be obtained from figuring according to the variation given by the Coast & Geodetic Survey wouldn't agree with the difference as I find between the true course and the course as given in the patent notes, which is 2° and 30′.

Q. When does the magnetic variation change in the district, if that Geodetic Survey is correct?

A. If there is a difference as shown now of 2° and 30′ between 87 and the present time that wouldn't be accounted for by the annual variation which they give, which is only two minutes a year.

Q. When did it change—that was right in 97?

A. It must have been changed between 97 and the present time.

Mr. HELLENTHAL.—Mr. Stuart, put that on the map.

(To cover the omission indicated on page 822 of the original transcript [printed record, page 1020], indicated by the line—"Mr. Stewart recalled—testimony entirely regarding Lotta.")

(Testimony of B. D. Stuart.)

Mr. B. D. STUART.

(By Mr. SHACKLEFORD.)

Q. Have you put the lower side line of the Lotta and the northeasterly end line of the Lotta on this Exhibit No. 7? [1487]

A. Southeasterly it is.

Q. Southeasterly end line, yes? A. Yes, sir.

Q. In accordance with the tie as indicated from the Ebner mill—what was that tie?

A. According to a connection—that is, following out that tie from the centre of the Ebner mill to Corner No. 1 of the Taku Gold & Silver claim, and then following out according to the official notes along the northwesterly boundary or end line of the Taku Gold & Silver and the Lotta and then out along the southwest side line of the Lotta, according to these same notes, which is in lead pencil.

By the COURT.—Corner No. 1 of the Taku Gold & Silver would be the lode line?

A. The one marked Number 1 is the lode line post.

Q. How far up the creek, at the intersection of the side line with the creek, will that throw that lower side line of the Lotta?

A. Measured perpendicularly to where?

Q. The side line of the Lotta as indicated by the stakes—is it across the creek?

A. It is 27 feet.

Cross-examination.

(By Judge WINN.)

Q. I thought yesterday when you left the stand that you were to run out the northwesterly end line

(Testimony of B. D. Stuart.)

of the Lotta, Taku, Keystone and Crown Point lode claims to find out where you contend that line is, but I guess that was not the understanding you had?

A. No, sir, I had no understanding about that. [1488]

Q. I will ask you if by taking the monuments that I referred to yesterday that Ed Webster testified concerning—you know those two monuments without repeating them, and taking the mill as a tie, if you have ever attempted to run down that line to see whether or not the corner No. 1 of the Lotta would be found exactly where we contend it is?

A. I have not tried that.

Q. This line that you put on the map this morning is the lower side line of the Lotta, according to what did you say?

A. Starting at the centre of the Ebner mill, ran out the tie to the Corner No. 1 of the Taku Gold & Silver as the patent notes call for and then ran out the rest of the northwesterly end line of the Taku Gold & Silver and the northwesterly end line of the Lotta as the patent notes call for, down to Corner No. 6 of the Lotta; and then ran out the southwesterly side line in accordance with the patent notes. Those are the tie and the courses around these claims platted according to the patent notes.

Q. Now, that line is drawn to a different variation you took from that which is in the patent notes?

A. No, it is a different course.

Q. But you run out on a variation of what?

A. I didn't use any variation at all—I didn't con-

(Testimony of B. D. Stuart.)

sider the ties in the question at all.

Q. You didn't consider the variation at which Garside made the survey?

A. Not at all—I considered only the true meridian.

Q. When you refer to the tie, of what claim did you say? A. The Taku Gold & Silver.

Q. That is the same as the Taku lode on this exhibit? A. Yes, the same thing. [1489]

Q. What tie do you mean?

A. From the centre of the Humboldt mill to corner No. 1—I mean the Ebner mill.

Q. From the centre of the mill?

A. That is the tie I was instructed to use.

Q. To corner what?

A. Corner No. 1—that is the northwesterly lode line of the Taku Gold & Silver.

Q. Then, what did you run?

A. Starting from the centre of the mill and following the patent notes according to the tie from the Ebner mill to the Corner No. 1 of the Taku, and then following the patent notes further on around to the southeasterly end line of the Lotta.

Q. Then, you run the line from Corner No. 6?

A. According to the patent notes.

Q. According to the patent notes and without any variation, according to the true meridian?

A. According to the true meridian and the courses and distances as called for in the patent notes.

Q. If you had run that line according to the variation that Garside has it, whether you would run it with your chain or run it in the manner I described

(Testimony of B. D. Stuart.)

yesterday by using either a transit or other instrument, would you run it along the same lines we have, where we claim the Lotta is?

A. By using the compass as a means of determining the meridian you would.

Q. Suppose you took your transit and just turned off 30° variation the same as Garside has, use your telescope for the same sighting purposes you would use those two slits [1490] through the compass, I want to know if you wouldn't get the same line we have—that would be the same as using the compass,—you would be using the meridian the same as you would your compass?

A. By using your transit and obtaining your true meridian as it is required by astronomical observation, you would obtain the lines as I have platted them in on exhibit 7.

Q. Then Garside, if there is a mistake in that course, it would have been made in your judgment because he didn't take the true meridian and run it according to the true meridian?

A. I wouldn't care to say how the mistake was made.

(By Mr. HELLENTHAL.)

Q. You located the Ebner mill upon the ground yourself and if the magnetic declination at the time Garside made the survey was 30°, it wouldn't make any difference whether he ran with a compass or with a transit, would it?

A. Not if he did the work correctly and the variation was that at that time, that would be all right.

(Testimony of B. D. Stuart.)

(By Judge WINN.)

Q. Taking and platting the Lotta claim as we determine it is on the ground, I want to ask you if there wouldn't be part of your mill dam on the patented Lotta claim, that is the defendant's company's mill dam, not the mill dam but dam for the flume?

A. I think I explained that yesterday—about the abutment you mean?

Q. Yes.

A. That abutment, I explained, that runs diagonally behind that boulder— [1491]

Q. I will ask you as a matter of fact if the defendant company's dam as extended across the creek it is not 78 feet in length?

By the COURT.—He answered the total structure was 78 feet.

A. I said 65 feet, I think—I measured from my point 107 which as I remember is the north end of the dam—I wouldn't say as to the exact length of it because I am measuring from my transit point there which I remember as being behind that boulder I spoke of.

Q. I will ask you whether or not the tie to the mill, the Ebner mill, does not bring Corner No. 1 just exactly where Mr. Hill and Mr. Wettrick have testified it is and where we contend it is on the ground?

A. Not exactly, no, sir.

Q. What is the approximate difference?

A. In the neighborhood of ten feet.

Q. Where does it bring corner 6 of the Lotta, the tie to the Ebner mill?

(Testimony of B. D. Stuart.)

A. About the same distance off, about ten feet.

(By Mr. HELLENTHAL.)

Q. That is assuming that you commence at the centre of the mill?

A. Assuming I commence at the centre of the mill and follow out the patent notes.

Q. What is the length of the dam as it actually exists on the ground? The dam across the creek?

A. I think I scaled that yesterday as 25 feet.

Witness excused. [1492]

[Testimony of R. G. Whalen, for Defendant.]

(To follow the omission on page 824 of the original transcript [printed record, page 1021] indicated by * * * , being part of the direct examination of R. G. Whalen by Mr. Hellenthal.)

Q. Did you find stake Number 5 and 6 of the Lotta upon the ground as testified to?

A. I find posts that were marked as testified to.

Q. Also a post that was marked for the intersection of the Forrest lode and Lotta?

A. I find a post marked corner No. 4 of the Forrest on one side and S. 87 on the other side, alongside the road.

Q. Is that line indicated there as the line connecting those points accurately delineated on exhibit 7?

A. Yes, sir.

(To following the first omission on page 829 of the original transcript [printed record page 1026] indicated by * * * and following the words, "Cross-examination: By Judge Winn," being part of the

(Testimony of R. G. Whalen.)

cross-examination of the witness R. G. Whalen.)

Q. How long has it been since you first knew where any of these stakes are located on the Lotta claim?

A. The first time I saw any of these stakes was last August, the last of August, last year.

Q. What stakes did you discover upon the Lotta claim, regarding the exterior boundary lines, last fall?

A. I saw the stake marked corner No. 4 of the Forrest which is claimed to be on the intersection with the lower side line of the Lotta and I saw the stake marked post No. 5 and the post marked, the stake marked Post No. 4 and the stake marked post No. 3—those are all I saw in August; I am not sure that I saw them in August or saw them there afterwards,— [1493] it was somewhere in there.

Q. Give me the date you did see them.

A. I saw the corner No. 4 marked Corner No. 4 of the Forrest in August or somewhere around there and I saw the flag sticking up over the one marked Corner No. 5 of the Lotta at that time, but I didn't examine the stake until later, until after the trial in the case No. 803, I think.

Q. You remember you made an affidavit in that case? A. I did.

(To follow second omission on same page indicated by * * * and being a continuation of the cross-examination of Mr. Whalen by Judge Winn.)

Q. At the time the application was made for a preliminary injunction in this case, you were not directed prior to the hearing of that case to go upon

(Testimony of R. G. Whalen.)

the Lotta to see whether you could discover any stakes or not?

A. The directions I had prior to that hearing were to find some stake of the Idaho or some stake of one of our claims and run a line up to the location notice and see where it was located, the location notice of the Mulligan water right.

Q. You did find a stake then of the Idaho?

A. I did.

Q. And then you run a line up to the stake that the notice of Mulligan was posted on in Gold Creek or on the bank of Gold Creek, the water notice?

A. I did.

Q. I ask you if that is your signature on this affidavit? A. It is.

Q. It is filed in case No. 803–A; do you know what you set out [1494] in that affidavit about running the Idaho line up just as described?

A. I haven't seen that since then—I haven't a clear recollection of just what I said.

Q. When the hearing was had on that application, you had not done any more in regard to finding out where the Lotta was located on the ground except to run this line from one corner of the Idaho up to the notice posted by Mulligan in the creek, that is all you were requested to do?

A. That is all the surveying I done, yes; I had seen that stake on the road and had sighted across just by eye to the flag.

Q. And then you made this affidavit, a portion of which reads as follows: You are a civil engineer by

(Testimony of R. G. Whalen.)

profession; that you together with your co-affiants made an actual survey upon the ground for the purpose of obtaining exactly the location of the southerly side line of the Lotta mining claim—that was one of your objects? A. Yes, sir.

Q. And that the Lotta survey is one of a series of surveys all made in that locality, and ties one to another in their various ways; that he and his co-affiants in running their lines to establish the said lower side line of the Lotta claim first commenced at Corner No. 5 of the Idaho claim, said claim being one of a series of claims, the surveys of which are tied together as above stated; that they did run the necessary lines from that stake to the intended point of diversion in Gold Creek referred to in the answer of defendants and figuring from the location of said stake with reference to the other surveys, including the survey of the Lotta, such intended point of diversion [1495] would be 78 feet below the southerly side line of the Lotta claim and on the Oregon claim —that is your affidavit?

A. Yes, sir.

Q. Then, you did make some efforts before the preliminary hearing to locate the Lotta lode claim on the ground?

A. Not to locate any of the stakes of the Lotta because I couldn't identify them, but to locate as it is given in there, I did.

Q. As a surveyor if you went on the ground to discover where the Lotta claim is exactly located, you wouldn't begin to look up any monuments or stakes

(Testimony of R. G. Whalen.)

to find out where it is located?

A. As I said I was directed to do just what I did.

Q. But did you state in your affidavit that you went on there to discover the lower side line of the Lotta lode claim?

A. I went on there to discover where the lower side line would be figured from this post, with that understanding I did.

Q. The post of the Idaho?

A. The post of the Idaho.

Q. As I understand it, you went on there to locate the Lotta claim, the lower side line of the Lotta claim? A. Yes, sir.

Q. But you want it understood that you had special directions to go on there and only make a survey from one corner of the Idaho up to the stake in the creek?

A. I was instructed to do nothing else but that—no, sir.

Q. I will ask you, as an expert, as you have attempted to qualify—you are a mining engineer and surveyor—I will ask you if it is not a fact that when a surveyor undertakes [1496] to go upon the ground and locate a mining claim, the boundaries of which are in dispute, if the first thing the surveyor does not do is to look up the ties of that claim and also to see whether there are any monuments on the ground? A. At that time—

Q. I don't mean at that time,—I am asking you now as an expert witness—you understand the question?

A. I understand the question—I would start from

(Testimony of R. G. Whalen.)

some point I knew, tie in the corners that I might find in the course of that survey and if I had unlimited time, I certainly would tie in all the corners and the creek and the natural monuments and permanent objects, but at that time I had one afternoon to do that.

Q. You have never been called upon as a surveyor of this company in the employ of the company to make such a survey as you have indicated?

A. I never have, no, sir.

Q. I understand then generally, in placing a creek upon a map or plat, that unless there is some special object for sketching that creek in exactly as it is upon the ground, that you don't pay so much attention to that?

A. It depends on the character of the map we are making.

Q. If it is a map you are making for a lawsuit and want to locate the creek, you would make some special efforts to locate it?

A. If it is a map that is intended for any permanent purpose I would make special efforts to locate every object as carefully as possible.

Q. This map that has been exhibited to you, Plaintiff's Ex. "II" that was used in the defense to our application for a restraining [1497] order—I believe you said you drew that?

A. I traced that from an old map, yes.

Q. It is simply a tracing from an old map you have in your office? A. Yes, sir.

Q. Who made that map in your office?

A. I don't know.

(Testimony of R. G. Whalen.)

Q. You heard Mr. Kinzie testify the other day on the witness-stand? A. Yes, sir.

Q. Is that the same map he referred to?

A. I believe it is.

Q. At how many points on Gold Creek have you measured the width of the creek, at the level of the surface of the water, that is taken from your dam say up to where the creek crosses the upper side line of the Lotta claim as we contend it is on the ground?

A. I didn't measure any with a tape.

Q. You didn't measure any with a tape?

A. Not myself, no, sir.

Q. Then, the width, etc., that you are giving there is from an estimate? A. Yes, sir.

Q. Do you know just how long your dam is across Gold Creek—did you help Mr. Stuart measure it?

A. Well, I was in the vicinity when he did measure it—I did not hold the tape, no.

Q. Do you know what measurement was obtained?

A. Only from his testimony.

Q. You didn't make any measurement of it yourself?

A. No, I didn't make any measurement of it myself, but I estimated [1498] it.

Q. When Mr. Stuart measured it from point to point, to what point did he measure it—what kind of an anchorage have you?

A. At the north end it is anchored upon a large boulder and is covered with dirt and at the south end it is anchored with hitches in the rock.

Q. It was between those two anchorages you measured the dam?

(Testimony of R. G. Whalen.)

A. I think it is between the large boulder and the hitches in the rock, I believe—I wouldn't be sure.

Q. You heard Mr. Stuart's testimony—he said it was either 60 or 65 feet—65 feet—what was the necessity of having a dam that wide there when the bed of the creek is only 25 feet wide?

A. That dam runs up the creek—I don't know the reason it was built there—I wasn't there when it was built.

Q. You know at high water the creek would be much higher than you estimate it, all along those points, would it not?

A. I tried to give an estimate at high water when I gave the bottom of the canyon—that would be the creek at high water.

Q. You never did measure the width of the creek up here where it crosses the upper side line of the Lotta?

A. That side line is not turned on the ground measured, only as it is shown on the map.

Q. Taking it for granted that the side line is where we contend it is and as placed on your exhibit here, according to our exhibit—have you ever measured it at that point where it crosses the upper side line?

A. I have never measured it with a tape, no.

Q. Did you help Mr. Stuart in making this map?

A. I did. [1499]

Q. All of them that he testified concerning? Exhibit 6?

A. I did nothing on exhibit 6—I don't think it has been offered.

By the COURT.—That is a map of the Lotta

(Testimony of R. G. Whalen.)

alone, exhibit 6? A. Yes, sir.

Q. Did you help him go up there and make this traverse line up the road and make these measurements as he indicated and established his stations along the creek to find out where the creek was on the ground?

A. I was with him; the traverse line on the road had been run before I went there, but I was with him when he occupied most of those stations and checked the angles and I was with him when he ran down to the creek and on that traverse up the creek and I was with him when he tied on to the traverse, on the Lotta—I sighted the points.

(To follow the omission on page 833 of the original transcript [printed record, page 1031] indicated by * * * being part of the cross-examination of Mr. Whalen by Judge Winn.)

Q. Briefly state to the Court how you ran that line to Corner No. 5 of the Idaho—state how you ran it up there.

A. Starting at Corner No. 5 of the Idaho marked 5 on Defendant's Ex. 7, I set a station just north of the junction of Snowslide Creek and Gold Creek, at which point we made our solar observation and then set a point just north of the cabin on the Alaska-Juneau and the next station was across Gold Creek, at about the point "d" in Gold; the station after that was about the point "c" in creek and from there we went up on the old Jualpa high line flume, ran around that flume to the intake of that flume and across the creek [1500] and by the creek we sighted to the stake at the Mulligan water notice.

(Testimony of R. G. Whalen.)

Q. A traverse line? A. A traverse line.

Q. You didn't run a straight line?

A. No, sir.

(By Mr. HELLENTHAL.)

Q. When you made your plat in that injunction suit, you located the southerly side line of the Lotta by starting from 5 in the Idaho and platting it in accordance with the patent notes of the Colorado claim? A. I did.

Witness excused (repeated).

[Testimony of G. C. Winn, for Defendant (Recalled).]

(On page 1040 of original transcript [printed record, page 1259] in place of the following line near the bottom of said page, to wit: "G. C. Winn, recalled. His testimony is entirely regarding Lotta," substitute the following:)

G. C. WINN, recalled:

(By Mr. SHACKLEFORD.)

Q. You are the United States Commissioner?

A. I am.

Q. I wish you would turn to your record of the Lotta and Taku Gold & Silver locations.

A. I am not sure I have the Lotta in this book—I have the Taku Gold & Silver.

Q. You have that record? A. I have.

Mr. SHACKLEFORD.—We desire to offer this in evidence with the privilege of substituting a certified copy. I will state [1501] the purpose of the location notice is to show that the Lotta location is a junior location to the Taku Gold & Silver.

By the COURT.—What is the difference in the dates?

Mr. SHACKLEFORD.—The Lotta location is dated May 24, 1884, and the Taku Gold & Silver is December 30, 1880.

Judge WINN.—We object to this as incompetent, irrelevant and immaterial to prove any of the issues in this case, and it is not shown that this is the notice under which this claim was abandoned. Your Honor will remember the evidence in this case that there was claim after claim staked out and abandoned, etc. I don't think this evidence should be allowed to go in for that reason; and furthermore the patent itself is the best evidence of what ground was patented, etc. The notice of location is admitted as Defendant's Exhibit No. 64. Plaintiff allowed an exception.

Mr. SHACKLEFORD.—It is the location notice of the Taku Gold & Silver by R. T. Harris and Joseph Juneau in Number 1 of Lode Claims at page 118 and we will substitute a certified copy. And we also offer a certified copy of the location of the Lotta lode, dated May 24, 1884.

Judge WINN.—I object to it as incompetent, irrelevant and immaterial for any purpose in the case.

Objection overruled. Plaintiff excepts.

It is marked Defendant's Exhibit No. 65 and admitted.

Mr. SHACKLEFORD.—I will ask the Court to enter an order accepting the various exhibits, some of them may have been omitted. Exhibit No. 49, which is the geological survey plat, I wish to withdraw.

Judge WINN.—I will object to each and all of the

exhibits offered and make the objection broad enough to cover them all as incompetent, irrelevant and immaterial and not tending [1502] to establish any of the issues in the case, and especially those maps and plats that were offered in evidence, that they show no ties to any monuments whatever, and the claims attempted to be located on there would be merely floating claims, and having no ties in the manner in which they attempt to locate them, they would be of no materiality as evidence in the case.

Objection overruled. Plaintiff excepts.

Mr. HELLENTHAL.—There are certain exhibits we will have to-day of the Borean pit, as to the condition that Stuart found there after his excavation. With the reservation as to Mr. Stuart and that certain photographs of the Borean pit that are now being prepared may be admitted, defendant closes his case.

By the COURT.—It is understood that the defense is closed except as to those photographs and Mr. Stuart platting in the Lotta according to Mr. Ebner's testimony.

Rebuttal.

(On page 1045 of the original transcript [printed record, page 1264] in place of the following: "Martin George sworn. His testimony is entirely regarding the Lotta"—insert:)

[Testimony of Martin George for Plaintiff (in Rebuttal).]

MARTIN GEORGE, called and sworn as a witness in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Did you bring up the field-notes, etc.?

A. Yes, sir.

Judge WINN.—I haven't had an opportunity yet to get a certified [1503] copy of the survey and field-notes of this group of claims that was patented, including the Lotta, and there has been so much evidence in this case one way and another, that is, talk among the attorneys more than evidence about these matters and thinking that the whole survey ought to go in, I will now offer in evidence the field-notes and survey as just indicated and will ask opportunity to substitute a certified copy—I can't take this from the surveyor general's office—I don't suppose there will be any objection to my substituting a certified copy later on.

Mr. HELLENTHAL.—No objection as far as the certified copy is concerned; we do object, however, to receiving the field-notes in evidence—I object to the reception of the notes in evidence as incompetent, irrelevant and immaterial, and that all the matters and things referred to in the field-notes and set forth in these notes have merged in the patent and that the field-notes themselves of the surveyor general's office are merely an evidentiary matter upon which

(Testimony of Martin George.)

the patent which is the official final judgment of the department is based.

Objection overruled. Defendant allowed an exception. When the certified copy is received it will be marked Plaintiff's Exhibit "OO."

Judge WINN.—It is the field-notes of United States surveys, the way it is numbered here—87, 88, 89, 90, 91, 92 and 93.

Q. It don't seem to have any filing mark on it of your office? A. No, not on this.

Q. You have been in the surveyor general's office since what date, Mr. George?

A. In Alaska? Since 1901.

Q. And what do you say is your duty in that office?

[1504] A. Chief draughtsman.

Q. I will ask you if surveys of like nature are turned into the surveyor general's office at the present time, that is, like the survey of this group of claims that the Lotta is included in? A. No, sir.

Q. Just state to the Court what different methods now, if any, you have of numbering surveys in that respect—where there is more than one claim surveyed at the same time. Objected to.

Judge WINN.—The purpose of this is to show that this survey is all one survey and they number them now and have been for a great many years last past, where there is a group of claims included in one survey, they only give it one number, but evidently at the time this was done, it was all considered one survey, but they call them lots and give each one a different number.

(Testimony of Martin George.)

Objection sustained. Plaintiff allowed an exception.

Q. I will ask you if at the present time and since you have been in the office, when a group of claims are surveyed all in one survey for a patent, if the claims all go in under the one number of the survey or each claim under a different number?

Same objection; objection sustained. Plaintiff allowed an exception.

Q. I will ask you if this survey, the field-notes of which we have just identified by you and in which the Lotta claim is included in the group, as to whether or not in your office, as a matter of fact, that is considered as one survey or as many different surveys as there are claims in the group? **[1505]**

Objected to as immaterial; objection overruled. Defendant allowed an exception.

A. That is considered as many surveys as there are in the group in the office or the records are kept that way, although it is under one number—that is, one entry and surveys number 87, 88, etc.

Q. They are all surveyed in a group?

A. Yes, sir.

Q. Now, I will ask you if, later on in your office, in these surveys, in making them this way, if there has been any change in the rule as to giving them separate numbers—each claim, or did you give the whole survey just one number?

Objected to; sustained. Plaintiff excepts.

(By Mr. HELLENTHAL.)

Q. You state that these surveys 87, 88, etc., are

(Testimony of Martin George.)

considered in your office as separate and distinct surveys?

A. They are separate and distinct so far as the numbers are concerned but they are all made in one entry.

Q. But they are considered as distinct surveys?

A. Yes, sir.

Q. You have been connected with surveyor general's offices before you came here?

A. Yes, indirectly—wasn't employed in the office.

Q. How long have you been directly or indirectly connected with this work of surveying public land surveys, etc.? A. About thirty years.

Q. Do you know how public land surveys were made back in the eighties by surveyors, whether by the use of the compass or by the use of the transit? [1506]

A. I never knew they were ever made by anything but the transit.

Q. What is the date of this? A. 1888.

Q. In 1888, were you then connected with the business of surveying public lands?

A. Yes, I was with my brother in Idaho at the time.

Q. You were in the surveying business at that time? A. Yes, sir.

Q. And had been for how many years prior to that time? A. Since about the early eighties.

Q. The courses and distances as given in these field-notes of the Lotta are considered as true courses, are they not? A. Yes.

(Testimony of Martin George.)

Q. And as surveyed upon the ground by means of a transit? A. Yes.

Q. Do you know what the regulations of the land department with reference to this matter of surveying in the past were, back in the eighties?

A. Lines had to be deflected from the true meridian.

Judge WINN.—Do I understand you were surveying in Alaska in the eighties? A. No.

Judge WINN.—I objected to that question and move to strike the answer—the rules and regulations would be the best evidence.

By the COURT.—After this length of time, in the absence of showing regarding the printed regulations, you may enquire.

Objection overruled. Plaintiff allowed an exception.

Q. Do you know what the regulations of the land department [1507] back in the eighties and in 88 were, with reference to the making of surveys of public lands and mineral surveys, as to whether the surveyor surveyed those with the use of a transit or with a compass?

A. To the best of my knowledge with a transit.

Q. What were the regulations as to how the courses must be given?

Same objection; objection overruled. Plaintiff excepts.

A. The lines were deflected from the true meridian.

Q. How was the true meridian ascertained?

(Testimony of Martin George.)

A. By astronomical or solar observation.

Q. And the lines as given in the surveys are read as deflected from the true meridian?

Same objection; objection overruled. Plaintiff excepts.

A. Yes, sir.

(By Judge WINN.)

Q. In what state were you surveying at the time that Mr. Hellenthal is questioning you about?

A. In 1888?

Q. Yes— You don't know anything about the rules and regulations in Alaska at that time?

A. No.

Q. You have searched the office and have not been able to find anything back of the two pamphlets you have brought up? A. I have, yes, sir.

Mr. HELLENTHAL.—Aren't the courses as given in the field-notes and patents read as true courses?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit "B," which is a certified copy of the map and plat under which these claims were patented [1508] and I will ask you, Mr. George, if the rules and regulations governing surveys in your office now, when a group of claims is surveyed together under one number, if you accept a survey with just one of the group of that survey tied up to a United States monument?

Mr. HELLENTHAL.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

(Testimony of Martin George.)

Q. I will ask you to look at that map and plat and state to the Court which one of those claims is tied up to a United States monument.

A. The plat shows a corner of the Crown Point to be tied to the monument and we should consider the survey was tied to the monument.

Q. The entire survey? A. Yes, sir.

(By Mr. HELLENTHAL.)

Q. The map shows the corner of the Crown Point tied to the monument? A. Yes, sir.

Q. Which one? A. Corner Number 2.

Q. Corner Number 2 of the Crown Point?

A. Yes, sir.

Q. That ties the entire survey in a way to the monument?

A. We should consider it so under the old surveys.

Q. The only survey, however, that is actually tied is Survey Number 90, the Crown Point?

A. Yes, sir.

Q. That is the only survey that is tied to the mineral monument [1509] on that plat?

A. Yes, sir.

Q. And the only corner in the entire group of surveys that is tied is corner No. 2?

A. Directly, yes, sir.

Q. There is no other corner tied to the monument in that entire survey? A. No, sir, not directly.

Q. You could calculate by calculating the courses and distances from that corner to other corners?

A. Yes, sir.

Q. But none of the other corners are tied to the

(Testimony of Martin George.)

mineral monument? A. Not directly, no.

Q. And not indirectly—because by a mere matter of calculation— A. A matter of calculation.

Q. Which one of those surveys is the first survey?

Objected to as incompetent, irrelevant and immaterial. Sustained.

Q. If the Lotta is a survey made prior to the Crown Point, then it is altogether a matter of calculation as to where the Lotta lies, with reference to the mineral monument, from that plat?

A. That should be explained before answering—as a matter of fact a surveyor would naturally go around the boundaries of the whole group before he would start to make the final survey and he would stake them off from calculations.

Q. The tie to the mineral monument is only one corner of the entire group? A. Yes, sir. **[1510]**

Q. And the mineral monument locates but one corner? A. One corner.

Q. (By Judge WINN.) You, however, don't change your position, the proposition that you consider that whole survey tied up by this one tie?

A. Yes, I consider it tied up.

(By Mr. HELLENTHAL.)

Q. This corner No. 2 is not one of the outside corners?

A. Yes—it is within the boundaries of one of the other surveys—it is inside the boundaries of another claim.

Q. And not an outside corner of the group?

A. No.

(Testimony of Martin George.)

Q. It is not a corner outside of other ground?

A. No.

Witness excused.

Sur-rebuttal.

[Testimony of R. D. Stewart, for Defendant (Recalled in Sur-rebuttal.)

(To supply the omission on page 1103 of the original transcript [printed record, page 1328] indicated by * * * and following the words, "Mr. Stewart, Recalled, by Mr. Shackleford.")

Q. (By Mr. HELLENTHAL.) Did you trace the Lotta claim on the ground in accordance with the testimony of Mr. Ebner, that is to say, allowing that the creek at the falls near corner No. 2 of the Lotta had changed to the left going up the creek a distance of some 25 feet? A. I did, yes, sir.

Q. How is the line so drawn indicated on Exhibit No. 7?

Judge WINN.—We make the general objection that this is incompetent, irrelevant and immaterial and is making a location [1511] on some supposition and is not sur-rebuttal.

By the COURT.—The objection will be overruled; it is sur-rebuttal under the reservation made at the close of their case.

Plaintiff allowed an exception.

Q. I mean, have you platted the Lotta, considering Mr. Ebner's testimony that the creek had moved 25 feet, in accordance with the field-notes as indicated in the patent of the Lotta, observing the ties to the creek and the courses and distances as given in

(Testimony of R. D. Stewart.)

the patent? A. I have.

Q. How is the claim indicated on exhibit 7 so platted?

A. I have drawn it with a lead pencil and marked the northeast side of the claim, northeast side line of the Lotta, according to patent notes, assuming Gold Creek to be shifted to the northwest 25 feet, and have also marked in lead pencil where the centre of the creek would lie along in the vicinity of the falls if the creek were shifted that distance to the northwesterly on exhibit 7.

Q. You don't understand me exactly—Mr. Ebner's testimony was that the creek had shifted, was at the present time 25 feet to the left of where it was twenty years ago—that would put your creek on the other side?

By the COURT.—No, Mr. Ebner testified that this slide shown on one of the pictures would throw it over—he had the change at the top of the falls, simply the falling out of this rock, but the bottom would be more of a difference.

A. I see what you mean—I would have to change that. I will rub that line out, I can put another one in and mark it, assuming the creek had shifted 25 feet the other way. Shall I [1512] mark that void there?

By the COURT.—You may do that.

Q. Have you now platted upon the map the Lotta claim, assuming that the claim has shifted to the left 25 feet as you go up the creek and platted the same in accordance with the field-notes as indicated in the

(Testimony of R. D. Stewart.)

patent, preserving the ties to the creek and the course and distance given in the patent? A. I have.

Q. How have you marked it on exhibit 7?

A. It is indicated with a lead pencil mark—it is marked the northeast side line of the Lotta according to patent ties assuming Gold Creek to have shifted northwest 25 feet.

Q. How far down the creek does that throw the claim from where it would lie if platted without making allowance for the shifting of the creek?

A. About 20 feet.

(To supply the omission on page 1105 of the original transcript [printed record, page 1331] indicated by * * * , being part of the cross-examination of Mr. Stuart by Judge Winn.)

Q. Have you got the falls marked on this exhibit?

A. Yes, the base of the falls and I have the rapids through the canyon there indicated.

Q. Where you have located the Lotta claim now, you have located it way up above the falls, the upper side line, that is, preserving both those ties and assuming that the creek had shifted at that point?

A. Mr. Ebner's testimony was, I believe, that it had shifted along the falls. **[1513]**

Q. He testified just below the falls they had shifted.

A. This is the base of the falls—this is below the falls; I assume it had changed here (indicating).

Q. The upper side line of the Lotta as you have it now is way up above the falls, is it not?

A. The side line of the Lotta is there, yes, sir; in

(Testimony of R. D. Stewart.)

order to preserve the distance of 40 feet from the northwest end line of the Lotta to the creek and at the same time preserve a tie of 1200 feet from the southwest corner of Gold Creek, and maintain the position of the creek according to the distances, that has to be done.

Q. Didn't you understand Mr. Ebner's testimony to be that the change was made just down below the falls, and when Mr. Shackleford was questioning him there was talk about water coming down from the falls and dropping down there and making a change below the falls?

A. Yes, that is what I assume.

Q. There isn't any one of your lines—the upper side line is way up above the falls, so you couldn't put it in there according to Mr. Ebner's testimony and retain the part of the testimony where he said the change was made below the falls?

A. There is the base of the falls.

Q. There is the base of the falls, yes, but Mr. Ebner said it was down below there the change was made—you have the upper side line way up above the falls?

Objected to as argumentative and not according to Mr. Ebner's testimony.

Q. If Mr. Ebner's testimony was that the change was down below the falls, where the water struck the ground from the falls, [1514] where it struck the bed and that had washed it out, then you have got your side line that you have placed on here in no position at all that is compatible with his testimony?

(Testimony of R. D. Stewart.)

A. I have assumed the position—I assumed the shifting of the creek in the general vicinity of the falls; assuming a change right at the falls alone would leave the claim in the same position that the green line shows as on there originally.

Q. Didn't you understand Mr. Ebner's testimony to be that from where the water falls down from the falls and a little below the falls, that he contended that the corner post was originally in that position and then he testified that where the original post should be according to our location of the claim that it washed out about 25 or 30 feet, something of that kind—didn't you understand his testimony to be that? A. No, I didn't understand it to be that.

Q. If that is true, that his testimony was that it was down below the falls that the change had been made, then you having your upper side line way up above the falls, it wouldn't be compatible with his testimony in that respect—leaving everything out about the field-notes but taking Ebner's testimony?

A. I understood Mr. Ebner's testimony that the change took place at the base of the falls, where the boulder projected up above the falls he showed the centre of the creek.

Q. If Mr. Ebner's testimony was that the change had taken place down at the foot of the falls and about where we contend that the corner post No. 2 of the Lotta should be and it had changed at that point, why then your drawing would [1515] not be compatible with his testimony—if that is his testimony, would it?

(Testimony of R. D. Stewart.)

Mr. SHACKLEFORD.—We object to the question as argumentative and not cross-examination and assuming a state of facts that do not appear in the record.

Objection overruled. Defendant allowed an exception.

A. It seems to me there is a contradiction in the question—I can't understand it; it seems to me that involves a contradiction—it involves the idea that No. 2 is—

Q. Never mind that—can you answer my question the way it is or can you not?

A. I cannot; no, sir.

Q. Now, then, you have placed the upper side line of the Lotta in this last drawing quite a considerable distance above the falls, have you not—isn't that true? A. It falls that way, yes, sir.

Q. Take a ruler and measure how far you have placed it above the falls?

A. The way I have drawn the Lotta in, the last way, assuming what I did when I drew it, it throws the northeasterly side line of the Lotta about 35 feet above the falls.

Q. Now, then, if the testimony of Mr. Ebner is that the change in the creek bed is below the falls, then putting the map in the way you have is incompatible with the theory of his testimony, is it not?

A. I don't think so.

Q. You have not calculated the winding of the creek down below the falls if Mr. Ebner's testimony said it was below the falls? A. I have.

(Testimony of R. D. Stewart.)

Q. And you have placed the upper side line way up above it? [1516] A. Yes, sir.

Q. I will ask you this question again—if Mr. Ebner's testimony was that the widening of the creek or the throwing of it to one side took place below the falls and in the neighborhood of where Corner No. 2 of the Lotta should be as we contend—then isn't your drawing and the placing of the Lotta as you have last placed it incompatible with his testimony?

Mr. SHACKLEFORD.—I want to enquire of counsel if they contend that the corner No. 2 of the Lotta should be at the foot of the falls?

The WITNESS.—That is what I don't understand—that is the reason I can't answer your question.

Q. Do you know where we contend the corner of the Lotta is?

A. I understood the contention was that it was right at the base of the falls.

Q. The way you have mapped the claim in on this map as according to our contention, you have placed Corner No. 2 below the falls, have you not—you have placed the Lotta in there according to our contention with the corner below the falls?

A. It fell below the falls as I surveyed the stakes on the ground—it fell on exhibit No. 7 that way and I so show on your exhibit.

Q. If the widening of the creek as testified by Mr. Ebner was below the falls, you haven't placed the Lotta in there consistent with his testimony?

(Testimony of R. D. Stewart.)

A. Yes, as near as I can.

Q. I will ask you to indicate on Gold Creek anywhere between Corner No. 6 of the Lotta as we contend it is and as you have put it in on your exhibit No. 7 according to our contention [1517] and if the creek is thrown over towards Corner No. 2 25 or 30 feet, where would that upper side line then according to your contention be?

A. You mean if the creek had shifted at that point?

Q. Yes.

A. If it had shifted to the northwest 25 or 30 feet originally then it was over here—if it shifted 25 feet it was originally 25 feet to the southeast.

Q. You have platted the creek in here according to what you said the field-notes show?

A. No, I have platted the creek in here as it is on the ground now.

Q. As it is now on the ground?

A. As it is now on the ground.

Q. Then, if it has shifted 25 feet over here, according to your contention it would be 25 feet the other way?

A. Originally it would have been—it must have been there originally to have shifted 25 feet.

Q. The reason you place it here according to this last specification is because you place the Lotta as you have testified concerning with its upper side line just above the upper side line that you have placed in up here and that last upper side line is where you place the Lotta, to find the place on the

(Testimony of R. D. Stewart.)

creek that you thought it would fit in according to the field-notes?

A. That is marked void, this is the last one I put in here.

Q. Where is the upper side line of the Lotta according to your placing it in the right position on the creek *that say* was the only position it could be placed in according to [1518] the field-notes in the survey and the description in the survey—which one of these is it? A. I think it is the green one.

Q. The one with the green lines you mean?

A. That is the one I originally put in there and said it was the only position that could be platted for the Lotta, assuming that the creek is as it is now—the change takes place because we assume a new position in the creek.

Q. Now, then, you are placing this last Lotta on there assuming that the position of the Lotta as indicated by the green line is the correct position for it to be?

A. Not at all—if I understand your question.

Q. I don't know what relative position you have given it in placing it upon the map this last time—didn't you place it upon the map assuming that you had correctly located it by the green lines on there?

A. No, I placed it on the map assuming that the creek had changed.

Q. You have placed the upper side line of the Lotta over near your green line, of the upper side line?

A. I measured the distance there and said I

(Testimony of R. D. Stewart.)
thought it was something like 20 feet.

Q. You place it this last time assuming that your green line location was a proper one, don't you?

A. Was a proper one if you assume that the creek is as it is marked on the map.

Q. And place it in accordingly? A. Yes.

(By Mr. HELLENTHAL.)

Q. Your assumption is in putting in that new Lotta on the map [1519] you assumed that Mr. Ebner testified that the creek had changed 25 feet for a considerable distance up the creek?

A. That is the idea and below the falls, too.

Q. If the change in the creek bed had been merely a local change that would have extended for only a few feet one way or the other at the lower part of the falls, would such change have any effect upon the location of the Lotta as far as the green lines are concerned? A. It would not.

Judge WINN.—We move to strike out all the evidence of the witness because he was called upon to place the line on the map according to the testimony of Mr. Ebner and it plainly shows that he did not place it on there according to the testimony of Mr. Ebner—he has placed it on on another theory.

Motion denied. Plaintiff allowed an exception.

(By the COURT.)

Q. You remember the picture that Mr. Ebner took and marked on the snow where he thought the Corner No. 2 was? A. Yes.

Q. How far have you placed this last line you have

(Testimony of R. D. Stewart.)

drawn on the Lotta—how far up the creek have you drawn the northeast side line, whatever he marked that corner?

A. I don't know as I saw the way he marked it on the snow.

Q. You simply took the one tie of Mr. Ebner's location and then ran out these courses and distances as called for in the patent—that is what you attempted to? A. In this case.

Q. Yes. [1520]

A. What I did in this case was to try to place the creek in such a way as to conform to the ties given from Corner No. 2 and 5 in the patent, that is 40 and 1200 feet, respectively, from those two corners and make its position parallel to the course given in the patent, assuming the creek had changed.

Q. If Mr. Ebner testified that Corner No. 2 of the Lotta would fall underneath that snow bank and somewhere beneath the boulders, how far up the creek have you pushed that side line of the Lotta, this last drawing you have made?

A. About 35 feet.

(By Mr. SHACKLEFORD.)

Q. How far is it from the foot of the falls to the intersection of the upper side line of the Lotta with the creek as staked on the ground?

A. The point which is marked No. 7 as the base of the falls, is the projection in the base of the falls to which Mr. Ebner testified and which shows in this photograph at the point marked "B"—I located that point on my survey; further, measuring in the gen-

(Testimony of R. D. Stewart.)

eral direction down along the creek it is 150 feet from the base of the falls to where the creek would cross the side line of the Lotta as indicated by the stakes which are on the ground.

Q. (By the COURT.) At right angles to the side line of the Lotta?

A. At right angles to the side line of the Lotta—it would be about 115 feet at right angles.

(By Judge WINN.)

Q. You made that last measurement, commencing at the letter "B" on exhibit "U"? [1521]

A. I made that from the small dark spot underneath the point "B" at the base of the falls.

Q. But you didn't make your measurement from what is marked on this, corner stake 2, S. 2, on this photograph?

A. I didn't have that point anywhere located on my map.

Q. You didn't make this last measurement commencing at that point? A. No, sir, I did not. [1522]

Deed of Mining Claim [Wm. M. Ebner to Ebner Gold Min. Co., Dated April 20, 1904.]

This indenture made this 20th day of April in the year of our Lord One thousand Nine Hundred and Four, Between William M. Ebner of the City of Juneau, District of Alaska, the party of the first part and the Ebner Gold Mining Company, party of the second part, WITNESSETH, That the said party of the first part for and in consideration of

the sum of One Dollar lawful money of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed and by these presents does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part and to its successors and assigns, the following described lode mining claims and mill-sites more particularly described as follows, to wit:

That certain lode mining claim containing 1500 linear feet on the Parish Number One Lode claim situates about two miles from Juneau up Gold Creek in Snow Slide Gulch, in the Juneau Recording District, Harris Mining District, District of Alaska, and described as follows, viz.:

Commencing at the Notice of Location, posted on a post in Snow Slide Gulch, about 750 feet in a Southerly direction from the Southwest corner of the Lotta lode claim and running 1000 linear feet in a southeasterly direction and 500 linear feet in a northwesterly direction, together with 300 feet in width of surface ground on each side of the center of the lode line: Side lines being described as follows, viz.: Commencing at the Northeast corner, marked by a post situated about 125 feet in a Southeasterly direction from the southwest corner of the said Lotta Lode claim, and on the southwest side line of the Royal Lode claim, thence along the southwest side line of [1523] the said Royal Lode claim its entire length, and continued in the same direction about 650 feet to a monument, thence in a southwesterly direction 600 feet to a monument, thence in a north-

westerly direction 1500 feet to a post, thence in a northeasterly direction 600 feet to a post, the point of beginning.

Also that certain lode mining claim located and containing 1500 linear feet on the Parish Number two lode claim situated about two miles from the Town of Juneau on Gold Creek in the Harris Mining District, District of Alaska, and described as follows, viz.: Commencing at the Notice of Location posted on a post in Gold Creek Canyon about 600 feet in a westerly direction from the southeast corner of the Lotta Lode claim and running in a southeasterly direction parallel to the said Lotta and Royal lode claims, and about 300 feet from the same to the end of lode claim Parish Number One being about 700 linear feet and from the location post in a northwesterly direction parallel with the southwest line of the said Lotta Lode Claim 800 linear feet together with 300 feet in width of surface ground on each side of the center of the lode line; Side lines being described as follows, namely, Commencing at the southeast corner marked by a post situated about 125 feet in a southeasterly direction from the southwest corner of the Lotta Lode claim, and on the southwest side of the Royal Lode claim, thence in a southwesterly direction 600 feet to a post, thence in a northwesterly direction parallel with the southwest side of said Lotta Lode claim 1500 feet to a post, thence in a northeasterly direction 600 feet to the southwest side line of the said Lotta Lode claim, thence southeasterly along the southwest side line of the said Lotta Lode claim to the southwest corner of said lode claim

and 125 feet beyond in the same direction to a post the point of beginning. [1524]

The notice of location of said lode mining claims are recorded on pages 156 and 157 respectively in Book 15 of Lodes of the records of the Juneau Recording District, District of Alaska.

Also that certain millsite containing five acres, more or less, of non-mineral land, known as the Lotta Millsite Situated just northwest of and immediately adjoining United States lots numbers 161 and 162 on Gold Creek in Harris Mining District, District of Alaska, and more particularly described in the location notice thereof recorded in Book VII of Placers on page 286 of the records of the Juneau Recording District, District of Alaska, to which notice reference is hereby made for a more particular and complete description.

Also that certain Millsite containing five acres, more or less, of nonmineral land known as the Keystone millsite site, situated just northwest of and immediately adjoining United States Lots numbers 161 and 162 on Gold Creek in Harris Mining District, District of Alaska and more particularly described in the location notice thereof recorded in Book VII of Placers on page 286 of the records of the Juneau Recording District, District of Alaska, to which notice reference is hereby made for a more particular and complete description notice of said millsite.

Together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein and also the rights, privileges and franchises thereto incident, append-

*and*ant and appurtenant or therewith usually had and enjoyed; and also, all and singular the tenement, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the rents, issue*d* and profits thereof; and also all the estate, right, title, interest, property, possession claim and demand whatsoever as well in law as in equity [1525] of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances;

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances and privileges thereunto incident, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

WILLIAM M. EBNER.

Witnesses:

C. C. HEID,

T. R. LYONS.

The change made in the word Southeasterly *were* the word South is written with pen on page 2 and the interlineation in line 2 page 3 were both made prior to the signing and executing of this deed.

United States of America,
District of Alaska,—ss.

This is to certify that on this 20th day of April, A. D. 1904, before me, the undersigned, a Notary Public in and for the District of Alaska, duly commissioned and sworn personally came William M. Ebner to me known to be the individual described in

and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] T. R. LYONS,
Notary Public for Alaska.

Filed for record at 10:45 o'clock A. M. April 23, 1904.

H. H. FOLSOM,
Recorder. [1526]

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording District, District of Alaska, in Book 20 of Deeds at page 10 of said records.

Witness my hand and official seal affixed at Juneau, Alaska, this 25th day of April, 1912.

[Seal of U. S. Commissioner.] G. C. WINN,
United States Commissioner, Ex-Officio Recorder for the Juneau Recording Precinct. [1527]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 3 o'clock P. M., Dec. 21, 1899, and duly recorded in book 15 Lodes, on page 157 of the records of said District.

NORMAN E. MALCOLM.
District Recorder.

Notice of Location of Quartz Claim.

Notice is hereby given that the undersigned having complied with the mining Act of Congress approved May 10th, 1872, and the amendments and supplementary laws thereto, and the local customs, rules and regulations, have located fifteen hundred (1500) linear feet on the Parrish No. 2 Lode Claim situated about two (2) miles from the Town of Juneau, on Gold Creek, in Juneau Recording District, the Harris Mining District and the District of Alaska and described as follows, viz.:

Commencing at the notice of location posted on a post in Gold Creek Canyon about six hundred (600) feet in a westerly direction from the southwest corner of the Lotta Lode Claim, and running in a southeasterly direction parallel to the said Lotta and the Royal Lode Claims and about three hundred (300) feet from the same, to the end of lode claim Parrish No. 1, being about seven hundred (700) linear feet, and from the location post, in a northwesterly direction parallel with the south-west line of the said Lotta Lode Claim Eight Hundred (800) linear feet, together with three hundred (300) feet in weidth of surface ground on each side of the center of the lode line for working purposes, side lines described as follows, viz.: Commencing at the south-east corner marked by a post situated about one hundred and twenty (125) feet in a southeasterly direction from the southwest corner from the Lotta Lode Claim and on the south-west side line of the Royal Lode Claim, thence in a southwesterly direction six hundred

(600) feet to a post, thence in a northwesterly direction parallel to the south-west side line of said Lotta Lode Claim fifteen hundred (1500) feet to a post, thence in a northeasterly direction six hundred (600) feet to the south-west side line of **[1528]** the said Lotta Lode Claim, thence southeasterly long the southwest side line of the said Lotta Lode Claim to the southwest corner of said lode claim and one hundred and twenty-five (125) feet beyond in the same direction to a post, the point of beginning.

Discovered and located this 24th day of October A. D. 1899.

WM. M. EBNER, Locator. **[1529]**

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording District, District of Alaska, in Book 15 of Lodes at page 157 of said records.

Witness my hand and official seal affixed at Juneau, Alaska, this 25th day of April, 1912.

G. C. WINN,
United States Commissioner, Ex-officio Recorder for the Juneau Recording Precinct. **[1530]**

Statement of Account—Parrish Lode.

1905.

1901.				1905.		
Jan. 31.	Development	.167	7.75	Jan. 5.	Development	.300 168.55
July 30.	W. M. Ebner	.188	16.25	Feb. 5.	"	....303 200.
Sept. 30.	" " "	...193	25.00			
Dec. 31.	" " "	...199	79.75			368.55
31.	Operating	...200	11.80			
1903.						
Jan. 5.	Wm. M. Ebner.	223	28.00			
1905.						
Feb. 5.	B. M. B. B.	...303	199.25			
	Mining	303	.75			
Apr. 5.	B. M. B. B.	...310	13.50			
	"	310	10.			
Dec. 5.	Geo. Dull	347	25.00			
1905.						
Jany. 5.	B. M. B.	352	40.00			
1906.						
July 5.	W. M. Ebner	..393	1.50			
Oct. 22.	Development	. 16	368.55			
" "	Mining	 16	1053.00			
			1880.10			
.....	.....		....			
Oct. 22.	To Balance...		1511.55			
Nov. 5.	Pay-roll	 18	17.00			
Dec. 5.	" "	 24	10.50			

[1531]

[Contract and Agreement Between Alaska-Juneau Mining Co. and Ebner Gold Mining Co., Dated March 10, 1909.]

THIS INDENTURE, made this 10th day of March, in the year of our Lord One Thousand Nine Hundred and Nine, between the ALASKA JUNEAU GOLD MINING COMPANY, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and doing business in the District of Alaska, the party of the first part, and the EBNER GOLD MINING COMPANY, a corporation organ-

ized and existing under and by virtue of the laws of the District of Alaska, the party of the second part,

WITNESSETH

That, Whereas, by a certain Contract and Agreement made and entered into by and between the parties herein, of date 25th day of April, A. D. 1905, wherein and whereby the party of the first part herein agreed to convey all of that portion of the Colorado Lode Mining Claim in conflict with the Parish Lode Mining Claim (which conflict is hereinafter fully described) upon receiving United States patent to said Colorado Lode Mining Claim, to the party of the second part herein, in consideration of said party of the second part herein dismissing and withdrawing a certain adverse suit which it had filed against the application of the party of the first part herein for a patent to the Colorado Lode Mining Claim, and in which adverse, so filed as aforesaid, the said Ebner Gold Mining Company, the party of the second part herein, claimed all that portion or parcel of said Colorado Lode Mining Claim in conflict with the said Parish Lode Mining Claim, the description of which conflict is the property in this deed conveyed to the said Ebner Gold Mining Company;

And Whereas the party of the first part herein has now obtained a patent for said Colorado Lode Mining Claim, including within its exterior boundary lines the conflict herein mentioned **[1532]** with the said Parish Lode Mining Claim.

NOW THEREFORE for and in consideration of the premises and the sum of $1.00 to the party of the second part, receipt whereof is hereby acknowl-

edged, the party of the first part hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, its successors and assigns:

All the following described real estate situate in the District of Alaska, to wit:

Commencing at corner number 6 Colorado Lode, Survey No. 641, whence corner number 5 Royal Lode bears North 33° 45′ West, 567.64 feet distant; thence South 33° 43′ West, 522.36 feet along lines 6–1 Colorado Lode to corner number 1 Colorado Lode; thence South 56° 15′ West 86.30 feet along lines 1–2 Colorado Lode to corner number 2; thence South 41° 15′ East, 34.96 feet along lines 2–3 Colorado Lode to corner number 3; thence South 84° West, 585.64 feet along lines 3–4 Colorado Lode to point of intersection with Southwest side line of Parish No. 1 Lode; thence along Southwest side line of Parish No. 1 Lode North 33° 45′ West, 600 feet to point of intersection with northwest side line of Colorado Lodes; thence along northwest side line of Colorado Lode lines 5–6, North 84° East, 678 feet to corner No. 6 Colorado Lode and place of beginning containing an area of eight and six-hundredths (8.06) acres.

All of said above described property being in the Harris Mining District, District of Alaska; together with all and singular the mines, minerals, lodes and veins (except as hereinafter reserved) within the lines of said above described conflict and their dips and spurs, and all improvements,

RESERVING, HOWEVER, to the said party of the first part a right to drive, occupy and use a tun-

nel through the ground so in conflict for the purpose of reaching and developing the mining properties belonging to said party of the first part.

ALSO RESERVING to the said party of the first part all those underground parts of veins underlying the surface of the tract hereby conveyed, the tops or apexes of which are outside of said conveyed premises, and within the boundaries of lode mining claims now owned or possessed by said party of the first part. [1533]

IN WITNESS WHEREOF the said party of the first part hath hereunto caused its corporate name and seal to be affixed the

10th day of March, 1909.

ALASKA JUNEAU GOLD MINING CO.

By F. N. BRADLEY,

President.

[Seal] Attest: JOSEPH H. MOOSER,

Secretary. [1534]

State of California,

City and County of San Francisco.—ss.

This is to certify that on this 10th day of March, 1909, before me, the undersigned, a Notary Public in and for said City and County duly commissioned and sworn, that F. N. Bradley President, and Joseph H. Mooser Secretary of the within named Corporation who are personally known to me to be such President and Secretary, respectively, of said Corporation, personally appeared before me this day, and acknowledged the within and foregoing Warranty Deed to be their free and voluntary act and deed, and the free and voluntary act and deed of said Corporation.

Witness my hand and official seal this 10th day of March, A. D. 1909.

[Seal] JOHN R. TYRRELL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]:

District of Alaska,

Juneau,—ss.

The within instrument was filed for record at 3 o'clock P. M. March 20, 1909, and duly recorded in book 22 of Deeds on page 182 of the records of said District.

H. H. FOLSOM,

District Recorder. **[1535]**

[Preamble and Resolution of Alaska-Juneau Gold Mining Co.]

WHEREAS, by a certain Contract and Agreement made and entered into by and between the Alaska Juneau Gold Mining Company and the Ebner Gold Mining Company, dated the 25th day of April, A. D. 1905, wherein and whereby the former Company agreed to convey all that certain portion of the Colorado Lode Mining Claim in conflict with the Parish Lode Mining Claim upon receiving United States patent to said Colorado Lode Mining Claim, to the Ebner Gold Mining Company, as set forth in said Contract and Agreement, and

WHEREAS the Alaska Juneau Gold Mining Company has now obtained a patent for said Colorado Lode Mining Claim, including within its exterior boundary lines the conflict mentioned with the said Parish Lode Mining Claim, and

WHEREAS the Ebner Gold Mining Company has requested the Alaska Juneau Gold Mining Company to comply with the terms of said Contract and Agreement of April, 25, 1905,

NOW THEREFORE, be it

RESOLVED that the President and Secretary of this Company, the Alaska Juneau Gold Mining Company, be and they hereby are authorized, empowered and directed to execute, in the name of this Corporation and deliver to the said EBNER GOLD MINING COMPANY, the said Deed as read to this Board of Directors, conveying Eight and six-hundredths (8.06) acres comprised in said Colorado Lode Mining Claim, and as per the terms and conditions of the Contract and Agreement of April 25, 1905, aforesaid.

I, Joseph H. Mooser, Secretary of the Alaska Juneau Gold Mining Company, do hereby certify that the above is a true, **[1536]** correct and full copy of Preamble and Resolution duly and regularly passed and adopted at a Meeting of the Board of Directors of said Corporation, held on the 10th day of March, 1909.

WITNESS my hand and the Seal of the said Alaska Juneau Gold Mining Company, this 11th day of March, 1909.

[Seal] JOSEPH H. MOOSER,
Secretary Alaska Juneau Gold Mining Company.

[Endorsed]: 182.

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 3 o'clock P. M. March 20, 1909, and duly recorded in

book 22 of Deeds on page 182 of the records of said District.

H. H. FOLSOM,
District Recorder. **[1537]**

[Contract and Agreement—Alaska-Juneau G. M. Co. and Ebner G. M. Co., Dated April 25, 1905.]

THIS CONTRACT and AGREEMENT made *an* entered into this 25th day of April, 1905, by and between the ALASKA JUNEAU GOLD MINING CO., party of the first part, and the EBNER GOLD MINING CO., party of the second part,

WITNESSETH:

THAT WHEREAS, the party of the first part has applied for a United States patent to that certain lode mining claim in the Harris Mining District, District of Alaska, at or near Snow Slide Gulch on Gold Creek about two miles from Juneau, known and designated as the Colorado Lode Claim; and whereas, said Colorado Lode Claim is in conflict with a certain lode claim known as the Parish Lode Claim, claimed by the said party of the second part. And the said party of the second part has filed its adverse claim and brought its adverse suit for the ground so in conflict, now therefore, in compromise and settlement of said litigation, it is hereby understood and agreed that the said party of the second part shall dismiss its said adverse suit and withdraw said adverse claim; that the party of the first part shall proceed with and prosecute to patent said patent proceedings, and when it shall have obtained a United States patent to the said Colorado Lode Claim, it shall make, execute and deliver to the party

of the second part a deed conveying to it all the ground in conflict between said claims, reserving, however, to the said party of the first part a right to drive, occupy and use a tunnel through the ground so in conflict, or any portion of the said Parish Lode Claim for the purpose of reaching and developing the mining properties **[1538]** belonging to the said party of the first part.

IN TESTIMONY WHEREOF, the parties hereto have hereunto affixed their corporate names in duplicate this the year and day first above written.

ALASKA-JUNEAU GOLD MINING CO.
By F. N. BRADLEY,
President.
By LOUIS H. MOOSER,
Asst. Secretary.
EBNER GOLD MINING CO.,
By WM. M. EBNER,
President.
By B. M. BEHRENDS,
Secty.

[Endorsed]:

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 10:09 A. M. Nov. 20, 1905, and duly recorded in book 18 of Agreements on page 577 of the records of said District.

H. H. FOLSOM,
District Recorder. **[1539]**

[Proposed Findings (Further).]

The Court further finds that the annual assessment

work required by law has been done and performed upon the Parish No. 2 Lode Mining Claim for the years 1908, 1909 and 1910. **[1540]**

The Court further finds that the annual assessment work and labor has been done and performed upon the Parish No. 2 Lode Mining Claim, each and every year since its location in the year 1899. **[1541]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

[Proposed] Findings of Fact and Conclusions of Law.

This cause coming on for hearing on the pleadings herein and a jury having been expressly waived, and the Court having heard the testimony and evidence of both plaintiff and defendant and argument of counsel, after all evidence had been introduced and cause submitted, finds as follows:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the United States provided for the District of Alaska and is authorized to do and has been engaged and doing a general mining business in the District of

Alaska and has dealt with the said defendant as such corporation for more than fifteen years last past.

II.

That the plaintiff is now and has been for several years last past seised in fee and possessed of, and entitled to the possession, of that certain patented lode mining claim situated in the Harris Mining District, District of Alaska, viz.: The Lotta Lode Mining Claim, U. S. Mineral Survey No. 87, more particularly described as follows, to wit:

> Beginning at Cor. No. 1 Lotta Lode Claim patented at a post now on the ground at Northwest center end of claim; thence north 57° 24′ East 150 feet to Cor. No. 2; thence South 31° 36′ East 150 feet to Cor. No. 3, identical with Cor. No. 5 Takou Gold & Silver Lode Claim, Survey No. 88 patented and Corner No. 1 Royal Lode, Survey No. 238, patented; thence South 27° 24′ West 150 feet to Southeast center end of Lotta Lode; 300 feet to Cor. No. 5, identical with Cor. No. 5 Royal Lode, Survey No. 238, patented, whence East side of Doorway of old **[1542]** cabin bears North 5° 7′ East 96.2 feet distant; thence North 31° 36′ West 1500 feet to Cor. No. 6; thence North 57° 24′ East 150 feet to Northwest center end and place of beginning; magnetic variation of all courses from true meridian 32° East of North.

III.

That while plaintiff was so seized the defendant between the —— day of August, A. D. 1910, and the commencement of this action, which was on the ——

day of ————, 1910, and without right or title entered into possession of part of said Lode Mining Claim and constructed thereon a portion of a dam for the purpose of conveying water from Gold Creek running through said patented claim, all of which said entry upon said claim was unlawful, wrongful, and ousted and ejected this plaintiff from that portion of said Lotta Lode Claim and said defendant wrongfully withholds the possession thereof from the plaintiff and the plaintiff is the owner and entitled to the possession of that part of said Lotta Lode Claim upon which a portion of said dam is constructed.

And as CONCLUSIONS OF LAW, the Court concludes:

I.

That the plaintiff herein is entitled to the possession of all that portion of the said Lotta Lode Claim upon which said dam is constructed, and this plaintiff has been ousted and ejected therefrom and is entitled to a Writ of Restitution and Ejectment herein to oust said defendant therefrom.

Let judgment and decree be entered accordingly.

Done in open Court this 12th day of June, A. D. 1911.

————————,

Judge. [1543]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

[Proposed] Findings of Fact and Conclusions of Law.

The trial of this cause coming on for hearing on the —— day of May, A. D. 1911, on the issues made by the Amended Complaint, the Amended and Supplemental Answer and the Reply to said Amended and Supplemental Answer, and a jury having by the respective parties been expressly waived, and the said plaintiff, Ebner Gold Mining Company, a corporation having introduced all of its testimony and evidence rested its case, and the defendant, Alaska-Juneau Gold Mining Company, a corporation, having introduced all of its testimony and evidence and rested its case, and the said plaintiff having introduced its rebuttal evidence and testimony, and the said defendant having introduced its sur-rebuttal evidence and testimony, and both parties finally rested, and argument of counsel representing the respective parties having been made, comes now the plaintiff, Ebner Gold Mining Company, a corporation, by its attorneys Winn & Burton, and submit to the Court the following findings of fact and conclusions of law

on behalf of said plaintiff, Ebner Gold Mining Company, a corporation, viz.:

1.

The Court finds that the plaintiff, Ebner Gold Mining Company, is a corporation, organized December 5th, 1895, and existing under and by virtue of the laws of the United States provided for the District of Alaska, and is authorized to do, and has been engaged in, and doing, a general mining business in said district for over fifteen years, and has been recognized by the defendant over said period of time as a corporation and dealt with by said defendant [1544] as such, and said plaintiff corporation is entitled to hold, deal in, and acquire title from the United States to mineral lands and has been qualified so to do at all the times mentioned in the Amended Complaint herein.

2.

That the defendant is a corporation duly organized to do, and doing, business in the District of Alaska.

3.

The Court further finds that the plaintiff is now, and has been for several years last past seized in fee, and possessed and entitled to the possession of that certain patented lode mining claim situated in Harris Mining District, District of Alaska, viz.: The Lotta Lode Mining Claim, U. S. Mineral Survey No. 87, more particularly described as follows, to wit:

> Beginning at Cor. No. 1 of Lotta Lode Claim, patented, a post at the northwest center end of the claim as found upon the ground at the trial of this suit; thence north 57° 24′ East 150 feet

to Cor. No. 2; thence South 31° 36′ East 1500 feet to Cor. No. 3, identical with Cor. No. 5 Takou Gold & Silver Lode Claim, Survey No. 88, patented, and Cor. No. 1 Royal Lode Claim, Survey No. 238, patented; thence South 57° 24′ West 150 feet to the Southeast center end of Lotta Lode; 300 feet to Cor. No. 5, identical with Cor. No. 5 Royal Lode, Survey No. 238, patented; whence East side doorway of old cabin bears North 5° 7′ East 96.2 feet distant; thence North 31° 36′ West 1500 feet to Cor. No. 6; thence North 57° 24′ East 150 feet to Northwest center end and place of beginning. Magnetic variation of all courses from a true meridian 32° East of North.

4.

That the plaintiff is now, and has been for several years last past, seized, possessed and entitled to the possession and the owner by discovery, location, staking and marking of the boundaries and recording by its grantors and predecessors in interest, and by a full compliance with the laws of the United States, and the doing and performing of the annual assessment work each and every year, of the Parish No. 2 Lode Mining Claim, situate in the Harris Mining District, District of Alaska, and fully described in the location thereof of record in Book 15 of Lodes, page 137 of the Juneau Recording District, at Juneau, Alaska, described as follows:

Commencing at the notice of location posted on a post in Gold Creek Canon about 600 feet in a westerly direction from the Southwest corner

of the Lotta patented claim and running in a Southeasterly [1545] direction parallel to said Lotta and the Royal Lode Claim patented, and about 300 feet from the same to the end of Lode Claim Parish No. 1, being 700 linear feet and from the location post in a Northwesterly direction parallel with the Southwest line of the said Lotta Claim 800 feet, together with 300 feet in width of surface ground on each side of the center of the lode line. Side lines are described as follows, viz.: Commencing at the Southeast Corner marked by a post situated about 125 feet in a Southeasterly direction from the Southwest Corner of the Lotta Lode Claim and on the Southwest side line of the Royal Lode Claim; thence in a Southwesterly direction 600 feet to a post; thence in a Northwesterly direction parallel with the Southwest side line of said Lotta Lode Claim 1500 feet to a post; thence in a Northeasterly direction 600 feet to the Southwest side line of the said Lotta Lode Claim; thence Southwesterly along the Southwest side line of the said Lotta Lode Claim to the Southwest Corner of said Lode Claim, and 125 feet beyond in the same direction to a post, the point of beginning.

5.

That while plaintiff was so seized and possessed and entitled to the possession of the above-described Lotta Lode Claim patented and Parish No. 2 Lode Mining Claim, the defendant between the —— day of August, 1910, and the —— day of

————, 1910, the commencement of this action, and without right or title entered into possession of a part of the said Lotta Lode Claim patented and of the said Parish No. 2 Lode Claim hereinabove described, and constructed and built upon, across and over said Lotta Patented claim and said Parish No. 2 Lode Mining Claim, a dam, and a grade, and placed thereon a flume for the purpose of conveying the waters of Gold Creek over, upon and across the said Lotta Lode Claim patented and the said Parish No. 2 Lode Mining Claim, and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

6.

The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of each and all of said mining claims and is now the owner and entitled to the possession of the same and each of the same as against the said defendant and all persons and corporations whomsoever, and said plaintiff is entitled to the possession of all and each of said mining claims and all of the surface ground thereof. [**1546**]

And from the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW.

1.

That the said plaintiff herein is entitled to a Writ of Restitution, and a Writ of Ejectment herein, restoring said plaintiff to the possession of the said Lotta patented claim and the said Parish No. 2 Lode

Mining Claim, as are more particularly set out and described in the Amended Complaint herein and the Findings of Fact, and said Writ of Ejectment to eject said defendant, its officers, agents and employees from said premises, and each and every portion thereof.

2.

That the plaintiff is entitled to a Restraining Order herein forever restraining and enjoining said defendant, its officers, agents and employees and successors in interest from in anywise interfering with the possession and ownership of said plaintiff in and to said mining claims set out and described in the Findings of Fact and Conclusions of Law and Amended Complaint, and each and every portion thereof; and for its costs and disbursements herein.

Let a judgment and decree enter herein accordingly.

Dated and done this —— day of ————, A. D. 1911, in open court.

————————,
Judge.

[Endorsed]: Original. No. 835–A. In District Court for Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Proposed Findings of Fact and Conclusions of Law. Filed June 12, 1911. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for ————. Offices: Juneau, Alaska. Office No. ——. [1547]

[Proposed Findings (Further).]

The Court further finds that the annual assessment work and labor required by law has been done and

performed upon the Parish No. 2 Lode Mining Claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law.

[Endorsed]: 835–A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mg. Co. vs. Ala. Jun. Gold Mg. Co. Proposed Finding of Plff. Filed July 5, 1911. E. W. Pettit, Clerk. [1548]

[Order Denying Certain Findings.]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

This matter coming on upon the plaintiff's request for Findings and the Court being fully advised, denies the Findings requested by the plaintiff other than those given in the Findings already filed.

Done in open court this 5th day of July, 1911.

EDWARD E. CUSHMAN,
Judge.

To the foregoing order plaintiff excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 271, Fairbanks, Alaska.

[Endorsed]: 1659. 835–A. Order Denying Findings (Plff's.). Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. **[1549]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Objections to Proposed Findings of Fact and Conclusions of Law Offered and Tendered by Defendant.

I.

Comes now the above-named plaintiff by its attorneys Winn & Burton and objects to Finding of Fact No. 4 offered and tendered by the said defendant, for the reason that the same is against the law and evidence offered upon said trial and is not supported by the evidence, and is against and not within the scope of the oral decision rendered by the Court in said cause, in that the said oral decision so made

and rendered by the Court in reference to the said Parish No. 2 Lode Claim only holds, and the Court only stated, that said location was invalid on the ground that the land claimed within the exterior boundary lines of said Parish No. 2 Lode Mining Claim was not mineral ground and that there was no sufficient discovery of valuable mineral by the locator to warrant a location of said claim as a mineral claim; and further the Court did not state in its oral opinion that the plaintiff and its grantors had failed to do the assessment work on said Parish No. 2 Lode Claim.

II.

Said plaintiff also objects to finding Nos. 5, 6, 7 so offered and tendered by defendant, for the reason and upon the ground that there is no evidence to support the same and that the said oral decision rendered by the Court did not refer to the matters therein stated, and said findings are immaterial and [1550] redundant, and not within the scope of the matters being litigated; that the Court did not attempt to pass upon the respective rights of the plaintiff and defendant to any water of Gold Creek, nor did the Court attempt to pass upon the question as to whether or not there were any miners' rules, regulations or customs in force which had any bearing upon the question or questions or property that was being litigated, and that said findings are unnecessary, for the reason that said Parish No. 2 Lode Claim was only found to be invalid by reason of the facts set forth in the foregoing objection set out in preceding paragraph.

III.

The plaintiff specially objects to the tendered finding No. 8 of the defendant, wherein the defendant attempts to have the Court state that it made an inspection of the property in litigation, but only examined the discovery of the plaintiff, and made no attempt to examine the discovery made upon the Oregon Lode Claim located by Corbus, when, as a matter of fact, there is no evidence to support such finding whatsoever, and it will be presumed that the Court in visiting the property in litigation made an examination of all the objects upon the ground and place and places upon the ground that would throw any light whatever upon the matter being investigated, and matters in dispute.

IV.

Plaintiff also objects to the finding which defendant offered following finding No. 8 offered by said defendant which is unnumbered, and especially that part of said findng so offered that reads as follows: "The Court further finds that the Oregon Mining Claim referred to in the defendant's answer as located by J. P. Corbus and the Oregon Mining Claim as located by R. G. Datson were made for the purpose of convenience," for the reason that the Court in its oral decision found that said location so made by Corbus and Datson were made without any discovery, and especially [1551] without a discovery of mineral bearing rock in place, and that there was no proof that said ground was mineral ground. This plaintiff does not object to that part of said finding wherein the Court is requested by defendant to find "that the Canyon mining claim is based upon

a discovery within the boundaries of the Lotta patented mining claim within described and is void and without effect."

I.

And this plaintiff objects to Conclusions of Law numbered 2 and 4, for the reason that said Conclusions of Law are not supported by the findings of fact and conclusions of law and the same are not supported by any evidence or facts in the case.

II.

And the plaintiff also objects to each and all of the findings of fact which defendant offered to the Court and included in their Answer in this cause, and to each and all and every of said so offered and tendered findings upon the ground and for the same reasons urged in objections numbered I, II, III, and IV as set forth herein.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 835–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Objections. Filed Jun. 15, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ——. [1552]

[Order Overruling Plaintiff's Objections to Proposed Findings, etc.]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

This matter coming on for hearing upon the plaintiff's objections to the proposed Findings of Fact and Conclusions of Law offered and tendered by the defendant and the Court being fully advised, each and all of said objections are hereby overruled and denied except as shown by the Findings already filed herein.

Done in open court this 5th day of July, 1911.

EDWARD E. CUSHMAN,
Judge.

To the foregoing order plaintiff excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 271, Fairbanks, Alaska.

[Endorsed]: 1659. 835–A. Order Overruling Plff's. Objections to Deft's Findings. Filed in the

District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. **[1553]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Stipulation [Extending Time to Oct. 21, 1911, to File Exceptions to Findings, etc.].

IT IS HEREBY STIPULATED AND AGREED by and between counsel representing the above-named plaintiff and counsel representing the above-named defendant, that the above-named plaintiff, Ebner Gold Mining Company, shall have until the twenty-first day of October, A. D. 1911, within which to prepare and file its written Exceptions to the Findings, Judgment and Decree made, entered and filed in said above-entitled cause.

Dated September 18th, A. D. 1911.

WINN & BURTON,
Attorneys for Plaintiff.

SHACKLEFORD & BAYLESS and
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

[Endorsed]: Original. No. 835–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska Juneau Gold Mining Co., Defendant. Stipulation. Filed Sep. 19, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ——. [1554]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Stipulation [Extending Time to Jan. 1, 1912, to File Additional Objections and Exceptions to Findings, etc.]

IT IS HEREBY STIPULATED AND AGREED BY and between Counsels for the respective parties that the Alaska-Juneau Gold Mining Company and the Ebner Gold Mining Company shall have until January first, 1912, to file additional objections and exceptions to the Findings of the Court and also to the Orders of the Court in refusing

to find any or all of the findings requested by either parties.

Dated this 18th day of October, 1911.

HELLENTHAL & HELLENTHAL,
per S. E.,
Attorneys for Alaska-Juneau Gold Mining Company.

WINN & BURTON,
Attorneys for Ebner Gold Mining Company.

[Endorsed]: Original. No. 835–A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Stipulation. Filed Oct. 18, 1911. E. W. Pettit, Clerk. By ————, Deputy. J. A. Hellenthal, Attorney for Defendants. Office: Juneau, Alaska. **[1555]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Objections and Exceptions to Findings and Conclusions Made by the Court and Those Offered by Plaintiff and Refused or Modified, Also Exception to Portion of Decree.

Comes now the above-named plaintiff and in compliance with and under an Order of the above-entitled court heretofore made and within the time expressed within the said Order and Stipulation entered into by and between the attorneys representing the respective parties herein, and files the following written objections and exceptions to the Findings of Fact and Conclusions of Law of the Court and judgment or decree rendered herein and its exceptions to certain findings of fact and conclusions of law offered and tendered by the plaintiff within the time required by law and refused or modified by the Court in so far as any of said findings and conclusions made and judgment rendered by the Court or findings tendered by the said plaintiff pertain to or affect what is known as the Parish No. 2 Lode Claim as set out and described in the Complaint herein.

I.

The plaintiff objects and excepts to finding No. 5 made, rendered, signed and filed herein by the Court wherein the Court finds that said plaintiff has never been seized or possessed of the Parish No. 2 Lode Claim set out and described in paragraph III of plaintiff's second cause of action, for the reason that said finding and the whole thereof is against all of the evidence in [1556] said cause and there is no evidence to support said finding, and the uncontra-

dicted evidence in said cause shows that one William M. Ebner, the locator of said Parish No. 2 Lode Claim, did make a discovery of mineral bearing rock in place according to law at the time of locating and staking out said claim.

II.

This plaintiff objects and excepts to all of that part of finding No. 6 made, rendered, signed and filed by the Court wherein the Court finds "no assessment work required by law to the extent of $100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parish No. 2 Claim prior to the year of 1909, and that plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909 after it attempted location in 1899"; for the reason that said finding, or said portion of said finding, is contrary to the law and contrary to the evidence and against the evidence, and in fact there is no evidence to support the same; that the uncontradicted evidence shows the annual assessment work during all of said times had been fully performed according to law.

III.

This plaintiff objects and excepts to finding No. 7 made, rendered, signed and filed by the Court herein, for the reason there is no evidence to support said finding; that it conclusively appears from the evidence in said cause that said Mulligan, mentioned in said finding, did not post any notice of location of water on August 1st, 1910; that said notice if posted at all was posted subsequent to said date, and if

posted at all was posted upon the patented Lotta Lode Mining Claim belonging to plaintiff; and that all of said finding is contrary to law and unsupported by the evidence and against the great weight of the evidence in said cause, and some portions of the same against the uncontradicted evidence in said cause. **[1557]**

IV.

Plaintiff objects and excepts to findings Nos. 8 and 9 made, rendered, signed and filed by the Court herein, except those portions of said findings wherein the Court finds that the defendant went upon the premises of the plaintiff, for the reason that all of the remainder of said findings and each of said findings are contrary to law, and against the evidence in said cause, and there is no evidence in said cause to support such portions of said findings.

V.

Plaintiff objects and excepts to conclusion of law No. 3 made, rendered, signed and filed by the Court herein, for the reason that said conclusion is not supported by the evidence in said cause; is contrary to law, and not supported by the findings made by the Court.

VI.

Plaintiff also excepts to conclusion of law No. 5 made, rendered, signed and filed by the Court herein, for the reason that said conclusion is contrary to law; contrary to the findings of the court, and contrary to the practise in the District Court for the District of Alaska, Division No. 1.

VII.

Plaintiff excepts to the refusal of the Court to make finding No. 1 as offered and tendered by plaintiff and to the modification thereof in leaving out the following clause, to wit: "And has been recognized by the said defendant over said period of time as a corporation and dealt with by defendant as such," for the reason that said finding was fully supported by the evidence in said cause.

VIII.

Plaintiff excepts to the refusal of the Court to make, render, sign and file herein finding No. 4 offered and tendered by plaintiff herein; for the reason that said finding is supported [1558] by the evidence in said cause, and in many respects by the uncontradicted evidence in said cause.

IX.

Plaintiff excepts to the refusal of the Court to make finding No. 5 as offered and tendered by the plaintiff herein, and particularly this plaintiff excepts to the action of the Court in omitting from said finding so offered, all that portion of said finding pertaining to the Parish No. 2 Lode Claim, and plaintiff excepts to the modification of said finding by the Court; and for the same reason and upon the same grounds, this plaintiff excepts to the refusal of the Court to make finding No. 6 as offered and tendered by plaintiff, and excepts to the modification thereof by the Court in leaving out all that portion thereof that refers to Parish No. 2 Lode Claim.

X.

Plaintiff excepts to the refusal of the Court to

make the following finding offered and tendered herein by plaintiff, and excepts to the Court's action in that respect in failing to make each and all of said findings, which said findings are as follows, to wit:

(a) "The Court further finds that the annual assessment work required by law has been done and performed upon the Parish No. 2 Lode Mining Claim for the years 1908, 1909 and 1910";

(b) "The Court further finds that the annual assessment work and labor has been done and performed upon the Parish No. 2 Lode Mining Claim, each and every year since its location in the year 1899";

(c) "The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parish No. 2 Lode Mining Claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law";

For the reason that each and all of said above-quoted [**1559**] findings were supported by the greater weight of the evidence and in many respects by the uncontradicted evidence in the case.

XI.

The plaintiff excepts to the refusal of the Court to make conclusions of law numbered No. 1 and No. 2 offered and tendered by plaintiff, for the reason that the same are supported by the evidence in said cause and the greater weight of the evidence.

XII.

Plaintiff excepts to the following portions of the Decree made by the Court herein, viz.: "It is further

considered, ordered, adjudged and decreed that the plaintiff take nothing further by his (its) complaint herein and except as to the Lotta Lode Mining Claim this cause and action be dismissed without costs to either side"; for the reason that the Court erred in the dismissal of said action as to the Parish No. 2 Lode Claim and should have adjudged and decreed the plaintiff the owner and entitled to the possession thereof; and the Court further erred in not allowing plaintiff costs in said action, for the reason that the plaintiff was granted affirmative relief and was adjudged to be the owner and entitled to the possession of the Lotta Lode Claim and the defendant ejected therefrom; no exception, however, is taken to the said judgment or decree in so far as the same in anywise pertains to or affects the title and right of possession of the Lotta Lode Claim.

WINN & BURTON,
Attorneys for Plaintiff.

Due service of a copy of the within is admitted this 17th day of October, 1911.

HELLENTHAL & HELLENTHAL,
Attorney for Defendant.

[Endorsed]: Original. No. 835–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Min. Co., Defendant. Exceptions to Findings, Conclusions and Part of Decree, etc. Filed Oct. 17, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office No. ——. [1560]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named plaintiff and moves the Court to set aside the Findings of Fact and Conclusions of Law herein in so far as said Findings of Fact and Conclusions of Law in anywise affect the title of the Parish No. 2 Lode Claim set forth and described in the Amended Complaint herein and in so far as said Findings of Fact and Conclusions of Law affect the ownership of said Parish No. 2 Mining Claim by this plaintiff, or in so far as they in anywise affect the right, title and interest of this plaintiff in and to said mining claim; and to grant a new trial herein and set aside said Findings of Fact and Conclusions of Law and the ruling and decision of the Court in respect thereto, the said plaintiff feeling aggrieved thereby for the following causes materially affecting the substantial rights of said plaintiff, to wit:

1.

Irregularity of the proceedings of the Court and

abuse of discretion of the Court, by which plaintiff was prevented from having a fair trial.

2.

Newly discovered evidence material for the plaintiff herein which could not with reasonable diligence have been discovered and produced at the trial.

3.

Insufficiency of the evidence to justify the findings of fact [1561] and conclusions of law herein referred to and the decision of the Court, and said findings of fact and conclusions of law and decision of the Court respecting the said Parish No. 2 Lode Mining Claim, and each and all of them, are against law, and that there is no evidence to support said findings of fact, conclusions of law and decision of the Court, and said findings are contrary to the evidence and against all of the evidence in said cause.

4.

Error in law occurring at the trial and excepted to by the plaintiff.

WINN & BURTON,
Attorneys for Plaintiff.

Due service of a copy of the within motion for new trial is admitted this 6th day of July, 1911.

W. S. BAYLESS,
Of Attorneys for Defendants.

[Endorsed]: Original. No. 835–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Motion for New Trial. Filed Jul. 6, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy.

John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ——. [1562]

[Order of July 5, 1911, Denying Motion to Set Aside Findings and Conclusions, and for New Trial.]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

This matter coming on for hearing upon the plaintiff's motion to set aside the findings of fact and conclusions of law affecting the title to the Parrish #2 Lode Mining Claim described in the amended complaint and to grant a new trial herein, and the Court having listened to counsel and being fully advised in the premises—said motion is denied.

Done in open court this 5th day of July, 1911.

EDWARD E. CUSHMAN,
Judge.

To the foregoing order plaintiff excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 272, Fairbanks, Alaska.

[Endorsed]: 1659. 835–A. Order Denying Motion to Set Aside Findings Affecting Title to Parrish #2. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. **[1563]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Order of July 7, 1911, Denying Motion to Set Aside Findings, etc.]

This matter coming on for hearing upon the plaintiff's motion to set aside the Findings of Fact and Conclusions of Law affecting the title to the Parrish #2 Lode Mining Claim described in the amended complaint and to grant a new trial herein, and it appearing that the plaintiff has refiled on July 6, 1911, its motion to set aside the findings and grant a new trial, and the Court having heard counsel and being fully advised in the premises, said motion is denied.

Done in open court this 7th day of July, 1911.

EDWARD E. CUSHMAN,

Judge.

To the foregoing order plaintiff excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 278, Fairbanks, Alaska.

[Endorsed]: 835–A. 1659. Order Denying Motion of Plaintiff to Set Aside Findings and Grant a New Trial. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 7, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [1564]

[Plaintiff's Exhibit No. 3 in Case No. 733–B.]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 803–A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation, ALASKA TREADWELL GOLD MINING COMPANY, a Corporation, L. D. MULLIGAN, O. M. HARRY and R. G. DATSON,
Defendants.

Answer [in Case No. 803–A.].

Come now the defendants and each of them, and for answer to the complaint of the plaintiff herein, admit, deny and allege as follows:

I.

The defendants deny each and every allegation in said complaint contained except in so far as the same are hereinafter expressly admitted.

II.

The defendants admit that the defendant, the Alaska Treadwell Gold Mining Company, and the defendant, the Alaska Juneau Gold Mining Company are corporations, doing business in the District of Alaska and aver that said corporation are authorized by their charters to hold mining property and conduct mining operations, in which business they are now engaged.

And the defendants, further answering and by way of affirmative defense, allege: **[1565]**

I.

That the defendant, the Alaska Juneau Gold Mining Company, is engaged in the business of opening up, developing, and operating mines situated at or near Silver Bow Basin, in the District of Alaska, and that said corporation is the owner of and in possession of a large group of mining claims, composed of thirty-one (31) patented and a considerable number of unpatented claims, situated in and near said Silver Bow Basin, and along Gold Creek, above the town of Juneau, in the District of Alaska. That said defendant has for many years past been operating its said mines and developing the same.

II.

That at the time of making the discovery thereon hereinafter referred to, the ground hereinafter described as being within the boundaries of the Oregon

lode mining claim was open, unoccupied, unexplored public land of the United States. That during the month of October, 1899, one J. P. Corbus, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals, within the exterior boundaries of the said Oregon claim as hereinafter described, and the said J. P. Corbus did thereupon locate the lode and vein within which said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did within a reasonable time thereafter and as soon as the necessary surveying could be done, post a notice on the ground, and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 1st day of November, 1899; that the claim so located was named and designated as the Oregon lode mining claim. That said Oregon lode claim so located and situated is situated at or near the head of the Last Chance Basin, Harris Mining District, District of Alaska, immediately below the ground described in plaintiff's complaint within **[1566]** the boundaries of the Lotta lode mining claim, and is more particularly described as follows:

> "Commencing at this notice and monument, the said monument herein identical with the corner No. 3, South No. 142, Last Chance, thence N. 17.15 E. 1310 feet to corner No. 2, S. No. 258—1500 feet to post; Thence N. 84.00 E. 150 feet to post intersect west side line Lotta or (Sotta)

S. No. 87. Thence S. 33.45 e. 550 feet to post on West side line of Lotta S. No. 87. Thence S. 17.15 W. 970 feet to post on NORTH Side Line Colorado, Thence S. 84 W. 600 feet to Cor. No. 3, S. No. 142 to the place of beginning, containing in area of eighteen acres more or less.

II.

That at the time of making the discovery thereon hereinafter referred to, the ground hereinafter described as being within the boundaries of the Wyoming lode mining claim was open, unoccupied, unexplored public land of the United States. That during the month of October, 1899, one A. N. Corbus, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals, within the exterior boundaries of the said Wyoming claim as hereinafter described, and the said A. N. Corbus did thereupon locate the lode and vein within which said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time thereafter and as soon as the necessary surveying could be done, post a notice on the ground, and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 1st day of November, 1899; that the claim so located was named and designated as the Wyoming lode mining claim. That said Wyoming claim so located and situated is situated near the head of the Last Chance Basin between

Snow Slide Gulch and Gold Creek, and adjoins the said Oregon lode claim and also immediately below the said Lotta claim, in said Harris Mining District, District of Alaska, and [1567] is more particularly described as follows:

"Commencing at this notice and monument, the said monument being identical with corner No. 5 S. No. 87 Lotta Lode claim, and with corner No. 5 S. No. 238 Royal Lode Claim. Thence S. 33.45 E 300 feet to post, thence S. 17.15 W. 280 feet to post on North side line of Colorado; thence S. 84.00 W. 600 feet to post identical with post of Oregon, thence N. 17.15, E. 970 feet to post; Thence N. 84.00 E. 60 feet to post on west side line of Lotta U. S. S. No. 87. Thence S. 33.45 e. 340 feet to post at corner No. 5. S. No. 87 the place of beginning containing ten acres more or less."

IV.

That said Oregon and Wyoming lode claims have by mesne conveyances been transferred to and are now the property of the Alaska Juneau Gold Mining Company, which said last-mentioned company is now the owner of and in possession of the same.

That the annual assessment work for each year since the year 1899 has been performed for both of said claims by the said Alaska Juneau Gold Mining Company.

V.

That the said Alaska Juneau Gold Mining Company has for many years last past been engaged in extracting the ore from its said mines and in develop-

ing the same, and has in connection with such work erected such mills and other appliances as were necessary to mill and extract the gold from the ore so mined, and has in connection with its mining operations erected a thirty stamp mill upon its said property and pressed the development work done on said mines with all convenient speed with a view of erecting other and larger mills and increasing its facilities for treating the ore extracted; that the development work done in connection with said mining operations has been carried so far that the erection of a two hundred stamp mill is now necessary to successfully carry on [1568] its said mining operations. With this end in view the said defendant corporation has laid out a plan which includes the erection and construction of a two hundred stamp mill on the shore of Gastineau Channel, immediately below the town of Juneau, and the building of a tramway from said mill along the proposed route, extending from said mill to a point on the Colorado lode mining claim, which said last-mentioned Colorado lode mining claim is owned and possessed by the said Alaska Juneau Gold Mining Company, and lies adjacent to and joins the Wyoming and Oregon lode mining claims above described, which said tramway will at its terminal connect with a tunnel to be driven from the point where such connections are made through various lode mining claims, the property of the said Alaska Juneau Gold Mining Company, to the point where the mining operations of said company are now being carried on. That there is flowing through, over and upon the above-described

Oregon lode mining claim a small creek carrying on an average, approximately, 25,000 or 30,000 miner's inches of water; that said creek enters the said Oregon lode mining claim across its northerly end line and flows thence southerly across said claim; that the waters of said creek so flowing across the said Oregon claim were, on or about the first day of August, 1910, unappropriated, unused and unclaimed by any person or persons whatsoever, and were flowing across said claim in their natural channel and thence on down through the Last Chance Basin and through Gold Creek Canyon into Gastineau Channel, an arm of the Pacific Ocean. That the Alaska Electric Light & Power Company have appropriated and are using a small portion of the waters of Gold Creek, diverting the same at a point approximately one-half mile below the point where the said Gold Creek passes out [1569] of the boundaries of the said Oregon lode mining claim; that there are no other appropriators or users of the waters of said Gold Creek at any place between the point where the said creek enters the said Oregon lode mining claim at its upper end and the mouth of said creek except the small portion diverted and used by the said Electric Light & Power Company as aforesaid; that all the remaining waters in the said creek on the said first day of August, 1910, unappropriated and open to appropriation for beneficial uses, and that on or about the said first day of August, while the said waters of said Gold Creek were thus unappropriated and unused, except in so far as they were appropriated and used by the said Alaska Electric Light &

Power Company, as aforesaid, one L. D. Mulligan, acting as the agent and employee of the defendant, the Alaska Juneau Gold Mining Company and for and on behalf of said company, located of the unappropriated waters of Gold Creek thus flowing therein as aforesaid, 20,000 miner's inches, to be diverted at a point on the said Oregon lode mining claim, about 30 feet below the lower side line of the Lotta lode mining claim, as the same is described in the plaintiff's complaint, and did then and there post a notice of his said location, which said notice of location is in words and figures as follows:

"KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910."

That said notice of location was signed by the said L. D. Mulligan in person, wherefore and whereupon, and on the 2d day of August, 1910, the said Mulligan made, executed and [1570] delivered to the said Alaska-Juneau Gold Mining Company his cer-

tain deed in writing, conveying to the said corporation all his right, title, and interest in the waters so appropriated, which said deed of conveyance was made and executed for the purpose of vesting in the said corporation the legal title standing in the name of the said Mulligan, who, although acting as agent of the said corporation, signed said notice of appropriation in his own name. That said notice of appropriation was thereafter, and on August 8, 1910, duly and regularly recorded in the office of the District Recorder of the Juneau Recording District, the same being the district wherein said right is located; that said notice of location was posted at or near the proposed point of diversion on the Oregon lode mining claim above described; that immediately after the posting of said notice, and upon the said 1st day of August, 1910, the said Alaska-Juneau Gold Mining Company commenced work looking toward the diversion and appropriation of the waters flowing in Gold Creek over and above any excess appropriated by the said Alaska Electric Light & Power Company to the extent of 20,000 miner's inches as claimed in said notice, and that a crew of men has been continuously at work in the construction of pipe, flume and ditch lines as well as the construction of a dam at the proposed point of diversion, all of which dam, pipe, flume and ditch lines are intended to and will be used for the purpose of so diverting the said waters of Gold Creek appropriated and located as aforesaid, and such work in connection with the diversion of said waters has been carried on by said company with as much speed as the conditions would

permit of and without cessation or delay, and is still being so carried on, and will be pressed forward until the waters have [1571] been diverted and applied in accordance with the original intention; that the waters so appropriated were appropriated for the purpose of generating power and for other beneficial uses in connection with the operation of the two hundred stamp mill to be built on the shore of Gastineau Channel as hereinbefore stated; that it is the intention and purpose of the said defendant, the Alaska-Juneau Gold Mining Company, to press the work of diverting the said waters and of conducting the same through pipes and flumes to the said proposed mill with as much speed as the weather and other conditions will admit of and without cessation or delay, and to erect said mill and have the same in readiness and to commence the construction of said mill as soon as the necessary material can be obtained and placed upon the ground, and to press said work to completion; and it is the intention of the said company to divert the waters of Gold Creek by means of said dam, flumes and pipe-lines as soon as the weather and other conditions will permit, and to complete the same in connection with the operation of said two hundred stamp mill, the same being the beneficial use so designed. That the use of all the said waters so appropriated to the extent of the said entire 20,000 inches will be necessary in the operation of the said mill. That the point at which construction work is being carried on in connection with the building of the dam in Gold Creek is situated on the property of the said defendant, the Alaska-Ju-

neau Gold Mining Company, at a point about 30 feet below the southerly side line of the Lotta claim as the same is described in the plaintiff's complaint, and that all the excavations, trails, aqueducts, flumes and other improvements made by the said defendant in connection with the said scheme for the diversion of said water and [1572] appropriation thereof as aforesaid have been made upon the said Oregon, Wyoming, and Colorado lode mining claims, below and south of the southerly side line of the Lotta claim as described in the plaintiff's complaint, which said Oregon, Wyoming and Colorado lode mining claims are owned and possessed by the said Alaska-Juneau Gold Mining Company as aforesaid, except in so far as work has been done in this connection along the proposed route of the tramway above referred to, the same being identical with the proposed route of the ditch and flume line by means of which the water so appropriated is to be conveyed to the place of intended use, the said company being possessed of and owning all that certain tract of land lying between the said Oregon lode mining claim and the point on which said mill is to be built, as aforesaid, along the route of the said proposed pipe and flume line as the same is delineated and laid out on the map hereto attached. That the location of the claims of the defendant, the Alaska-Juneau Gold Mining Company, as well as the properties lying adjacent thereto and in the vicinity thereof, as well as the streams and other physical conditions, also the proposed ditch and flume line, proposed tunnel line, proposed mill and other matters and things referred

to in this answer, are correctly delineated and laid out on the plat hereto attached, which is made a part of this answer in order to give a more detailed and accurate description of the things thereon delineated.

VI.

That at the time of the commencement of this action, and for a long time prior thereto, and ever since, the defendant, the Alaska-Juneau Gold Mining Company, has been and still is in the actual, exclusive, open, notorious, physical possession and occupancy of all and singular the said Oregon, Wyoming, [1573] and Colorado lode mining claims as well as the right of way of the proposed flume and tram line above described which possession has been actual and to the exclusion of every one else whatsoever.

VII.

That under the local rules and customs of the miners of Harris Mining District, the same being the district through which Gold Creek flows along its entire length, as well as under the customs of the miners throughout the entire District of Alaska, and under the decisions of the courts of said district, the right to the use of water flowing in the natural watercourses may be acquired by appropriation, diversion and application to a beneficial use, and which said right so acquired by appropriation is recognized and exists under and by virtue of the local rules and regulations as well as the local custom of the miners of said mining district and of the said District of Alaska and by the courts of the said District.

VIII.

That under the local rules and regulations of the miners of Harris Mining District, as well as by the custom of miners of the said Harris Mining District and the District of Alaska, which said custom has been universally followed and observed by the miners throughout said mining district for many years and is still so universally observed not only by the miners of said mining district but by the miners throughout the entire District of Alaska as well, the right to the use of water by appropriation is initiated by the posting of a notice containing the essentials contained within the notice of L. D. Mulligan hereinbefore set out, at a point at or near where the water is intended to be diverted, which said custom not only requires the posting of such notice aforesaid, but also **[1574]** requires that the same be recorded with the district recorder within thirty days after such posting, it having been the universal custom for many years with the miners of the Harris Mining District and of the District of Alaska to so record such notices.

IX.

That the work so done by the defendant company adds to and in no wise detracts from the value of the property on which said work is being done. That a court of equity is without jurisdiction in the premises for the reason that the plaintiff, if it has any cause of complaint, has a plain, adequate and speedy remedy at law.

WHEREFORE, the said defendants, and each of them, pray that the plaintiff's complaint be dismissed, and that they recover their costs and dis-

bursements in this behalf incurred, and be granted such other and further relief as they may under the facts proven be entitled to.

SHACKLEFORD & BAYLESS,
HELLENTHAL & HELLENTHAL,
Attorneys for the Defendants.

United States of America,
District of Alaska,—ss.

I, Robert A. Kinzie, being first duly sworn, on oath say: That I am the agent and Gen'l Superintendent of the Alaska-Juneau Gold Mining Company and the Alaska Treadwell Gold Mining Company, defendants in the above-entitled action; that I have read the foregoing answer and know the contents thereof and believe the same to be true; that I make this verification because none of the officers, directors or other agents of the said companies, or either of them, are within the District of Alaska.

ROBT. A. KINZIE. **[1575]**

Subscribed and sworn to before me this 30 day of August, A. D. 1910.

[Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 30 day of August, 1910.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: 733–B. Plff. Ex. No. 3. R. E. R. Original No. 803–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, a Corporation, Plaintiff, vs.

Alaska-Juneau Gold Mining Company et al., Defendants. Answer. Filed Sep. 1, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Lewis P. Shackleford & Bayless and Hellenthal & Hellenthal, Attys. for Defts. Office: Juneau, Alaska. [1576]

[Plaintiff's Exhibit No. 4 in Case No. 733–B.]

In the District Court for the District of Alaska, Division Number One.

No. 802–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation, ALASKA TREADWELL GOLD MINING COMPANY, a Corporation, L. D. MULLIGAN, O. M. HARRY, and R. G. DATSON,

Defendants.

Oral Opinion [in Case No. 733–B.].

Mr. N. L. BURTON, for Plaintiff.

Messrs. J. and S. HELLENTHAL and W. S. BAYLESS, for Defendants.

There isn't any question but what a court of equity will always lend its assistance towards the preservation of property during the trial of an action where the property, or the title of the property, is in controversy, that is: if in a suit in equity, or in an action of law, injunctive relief is asked pending the trial of the action to prevent the destruction of the property, or to prevent the extraction of its

values, there isn't any doubt but what a court of equity should, and will, issue a restraining order to prevent a diminution of the value of the property pending the litigation.

What are the facts in this case? Plaintiff claims certain water rights on Gold Creek, also claims certain mining claims, patented and unpatented. He claims that the defendants have gone upon one of the patented claims and began to divert the water of Gold Creek. There is no evidence, not even an insinuation, that there is any of the water being sought to be diverted over which the plaintiff has any prior [1577] right, or to the use of which the plaintiff has any prior right.

There isn't any question but what water may be diverted for mining purposes. There isn't any question under the late ruling of the Appellate Court but what the riparian owner will not be heard to object to the diversion of water, unless he himself is putting the water to some beneficial use, and he then must show that the water that is being taken is diminishing the water that he had prior to that time been actually using. In other words, the law of appropriation of water rights obtains in this jurisdiction.

Now, what is the situation with reference to trespass or the alleged trespass? It is true the plaintiff claims and offers evidence to the effect that the attempted diversion is on his patented claim and, my own judgment is that, if that were uncontradicted, the Court should restrain the trespass, but is that the case here? Counsel says with a good deal of

energy that the defendants merely literally denied the ownership of the plaintiff.

Now, let's see what the proof is. The record shows that it is not on the Lotta claim. The records may be wrong, but surely no court of equity will so hold in a preliminary hearing and put a man who is out of possession in possession and dispossess the one in possession. These stakes on the Lotta claim may be the original boundary corner of that claim and, if that is true, the attempted diversion is on the Lotta claim, but why should the Court assume that these monuments are more apt to be correctly located than the monuments of the Idaho although they may have been there for many years. It is very easy for a man in going over these claims to see a stake to-day and see it again in three years from now and think it is in the same place. But be that as it may, there is a method by which it can be determined positively whether or not this diversion is on patented ground or otherwise. That hasn't been done by either party. [1578]

Counsel has asked me if I have any doubt as to where the title lies. I certainly have very substantial doubt as to where the title is, and I think that anybody could not have heard the testimony but what he would think the same way and would have a substantial doubt as to whether the attempted diversion, or the alleged trespass, is within the boundaries of a patented claim.

Now, as to the unpatented claim, as a matter of fact there has been no proof of title of any claim, or any mining claim offered. There may have been a

sort of tacit admission. The only way to prove a mining claim is to follow the law and show that its boundaries have been all marked, that they can be readily traced, that its corners have been marked and a discovery made. It is true there are affidavits here that the assessment work has been done and certain monuments located. There isn't a syllable of evidence as to whether any of these claims were legally located mining claims, and for a court of equity on evidence in the form of ex parte affidavits, without seeing these claims, to say that one claim is a valid claim under such testimony and that the other is a void claim, and grant a restraining order against a trespass where there has been no proof that the injury is irremedial or could not be compensated in damages, or that the damages would be of any particular consequence, is going farther than any court should go in a hearing for a preliminary restraining order.

So, it seems to me in a case of this kind where there is any substantial doubt as to the title of the property, and where there is no doubt the defendants are taking infinitely more chance—they are doing this at their peril,—they must believe they have title, —as I say, they are the ones that are taking the chance, and when a Court can see no reason why there would be any resulting irreparable damages, I think that a Court [1579] ought not to hesitate in refusing an injunction.

Courts should not only follow the law, but they should take a business view of the testimony and a business view of the transactions of men in interpret-

ing their rights, and in interpreting their motives and intentions and, as I say, it seems to me that the defendants are assuming more peril in constructing a work of this kind on disputed ground than the plaintiffs are, if they don't succeed in showing their title at the final hearing.

So far as any water rights the plaintiff may have upon Gold Creek, there is no evidence that this diversion will in any way conflict with those rights; in fact, there couldn't be any evidence of that sort, because the man who is down the stream is the man that must be heard to cry for the water and, when he does so, the Court will then determine what were the rights of the plaintiff in this court and the total amount of water he was entitled to at the date of the inception of plaintiff's or defendants' appropriation.

The restraining order will be refused.

To which opinion plaintiff excepted and an exception is allowed.

Done at Juneau, Alaska, September 2, 1910.

[Endorsed]: 733–B. Plffs. Ex. No. 4. R. E. R. Form No. 680. In the District Court of the United States for the Div. No. 1 of Alaska, Ebner Gold Mining Co., a Corporation, vs. Alaska-Juneau Gold Mining Co., a Corporation et al. Oral Opinion. Filed Sep. 6, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. **[1580]**

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

Certificate [of Clerk U. S. District Court to Certain Papers].

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached forty pages of typewritten matter, numbered from 1 to 40, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of:

Proposed Findings of Fact and Conclusions of Law, filed June 12, 1911, pages 1 to 7, inclusive.

Proposed Finding of Plaintiff, filed July 5, 1911, page 8.

Order Denying Findings (Plff's.), filed July 5, 1911, in 4th Division, and Aug. 21, 1911, in First Division, page 9.

Objections, filed June 15, 1911, pages 10 to 12, both inclusive.

Order Overruling Plff's. Objections to Deft's Proposed Findings, filed July 5, 1911, in 4th Division, and Aug. 21, 1911, in First Division, page 13.

Stipulation, filed Sep. 19, 1911, page 14.

Stipulation, filed Oct. 18, 1911, page 15.

Exceptions to Findings, Conclusions and Part of Decree, etc., filed Oct. 17, 1911, pages 16 to 20, both inclusive.

Motion for New Trial, filed June 13, 1911, pages 21 and 22.

Order Denying Motion to Set Aside Findings Affecting Title to Parrish #2, filed July 5, 1911, in 4th Division, and Aug. 21, 1911, in 1st Division, page 23.

Order Denying Motion of Plaintiff to Set Aside Findings and Grant a New Trial, filed July 7, 1911, in 4th Division, and Aug. 21, 1911, in 1st Division, page 24.

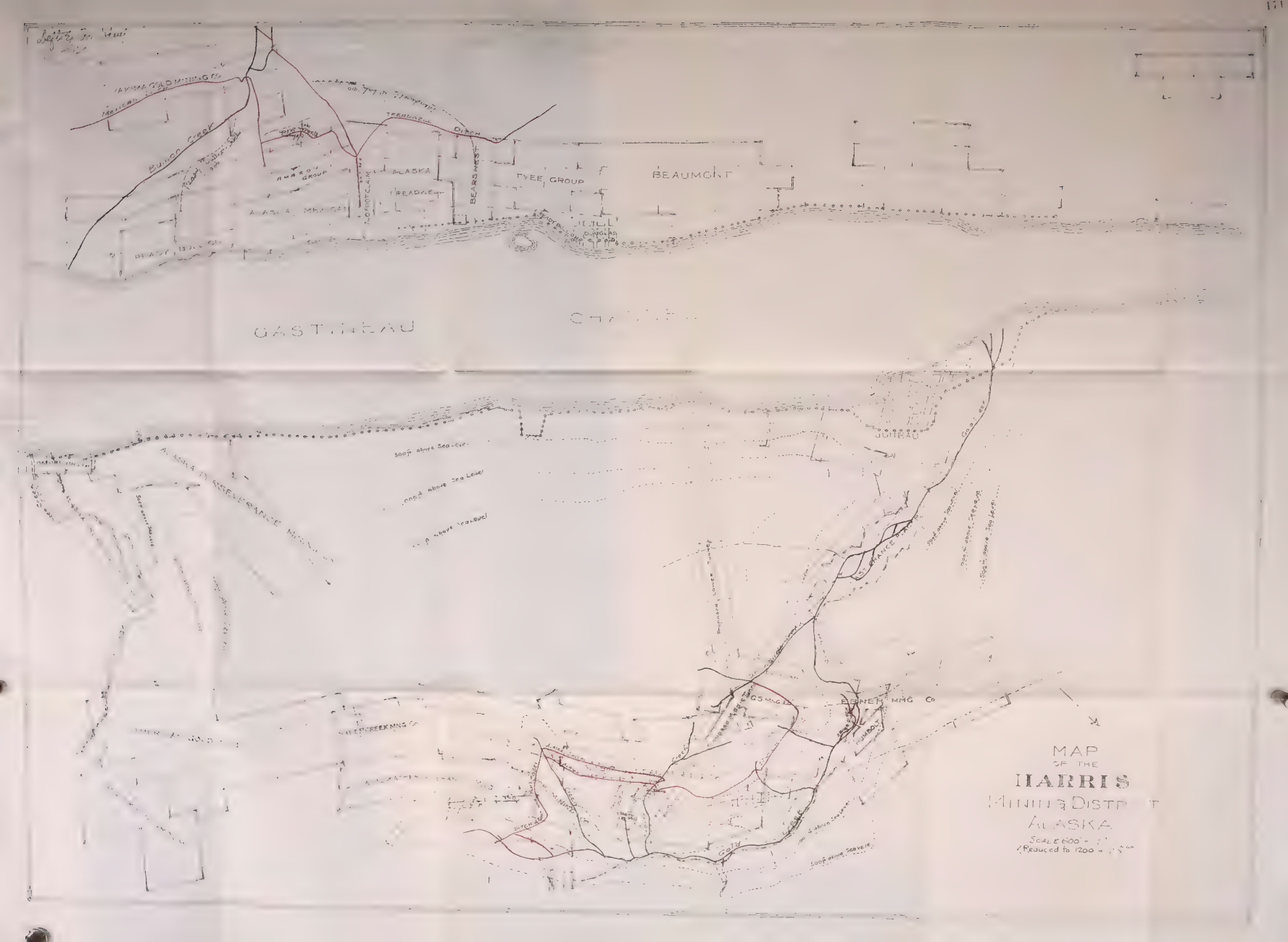
Defendant's Answer, filed Sept. 1, 1910, pages 25 to 36, both inclusive.

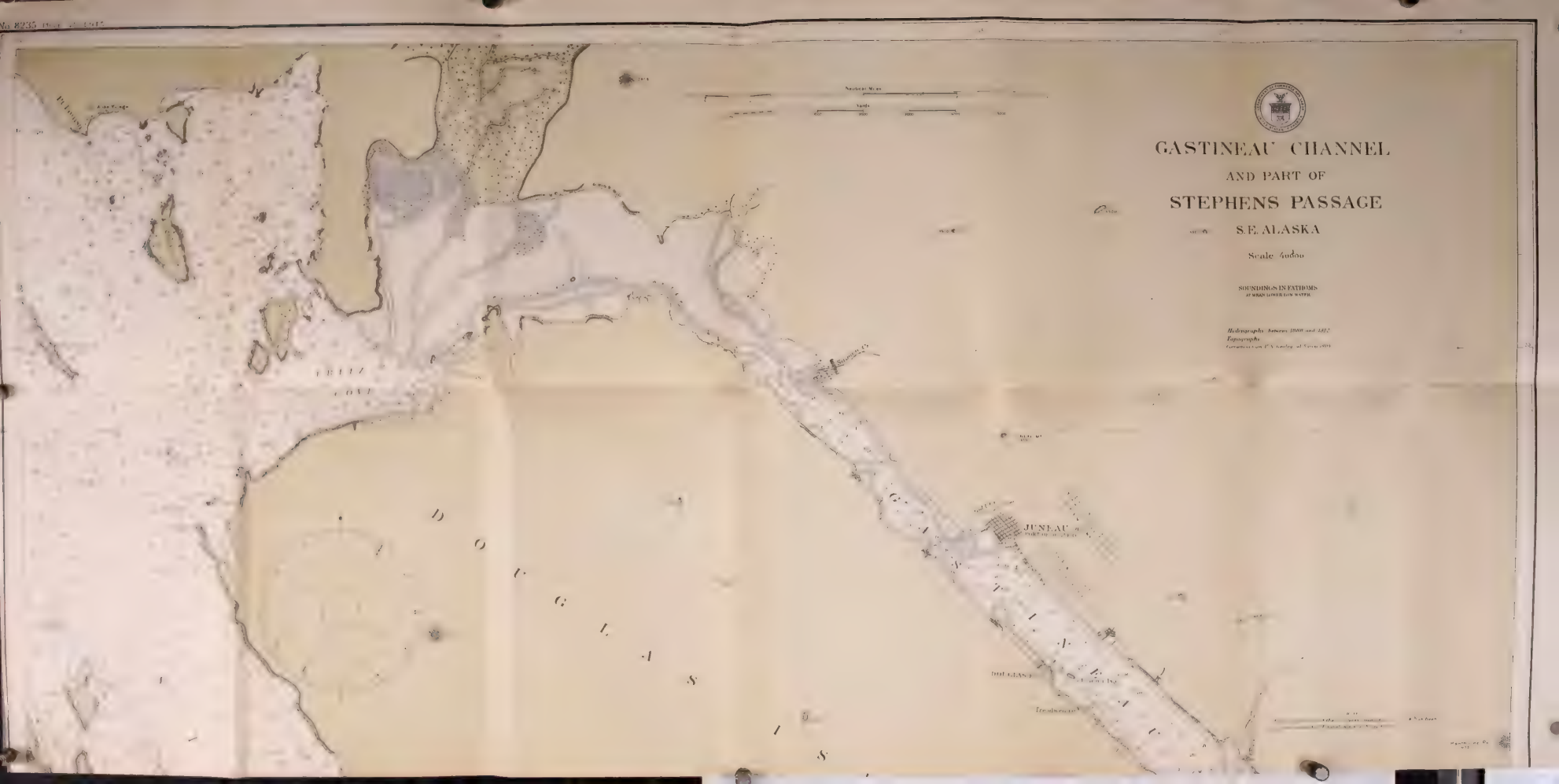
Oral Opinion, filed Sept. 6, 1910, pages 37 to 40, both inclusive.

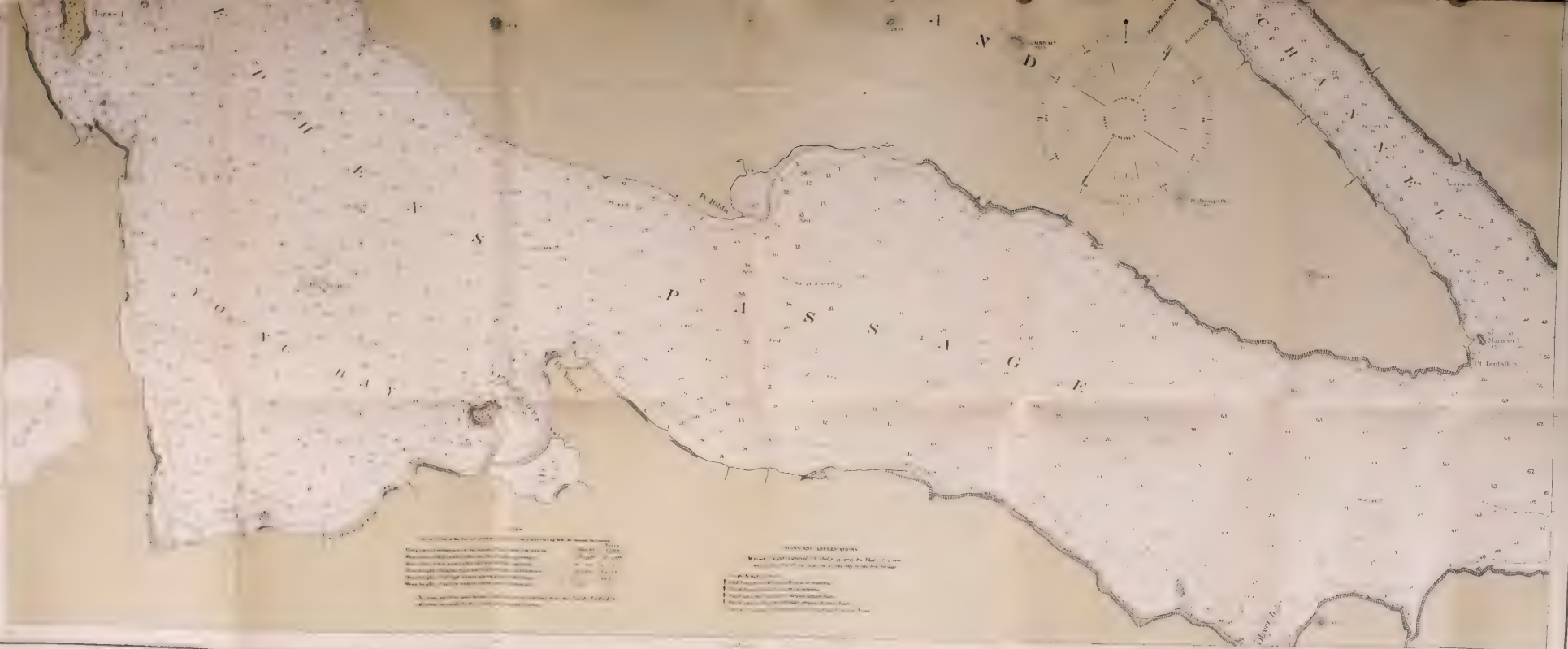
IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 11th day of May, 1912.

[Court Seal]

E. W. PETTIT,
Clerk.
By J. J. Clarke,
Deputy. [1581]


ALASKA GOLD MINING CO
TREADWELL DITCH
Bonanza Creek
ALASKA
TREADWELL
BEARS NEST
TYEE GROUP
BEAUMONT
GASTINEAU
JUNEAU
Gold
DEXTER MNG Co
MAP
OF THE
HARRIS
MINING DISTRICT
ALASKA
SCALE 600 - 1"
(Reduced to 1200 - 1")

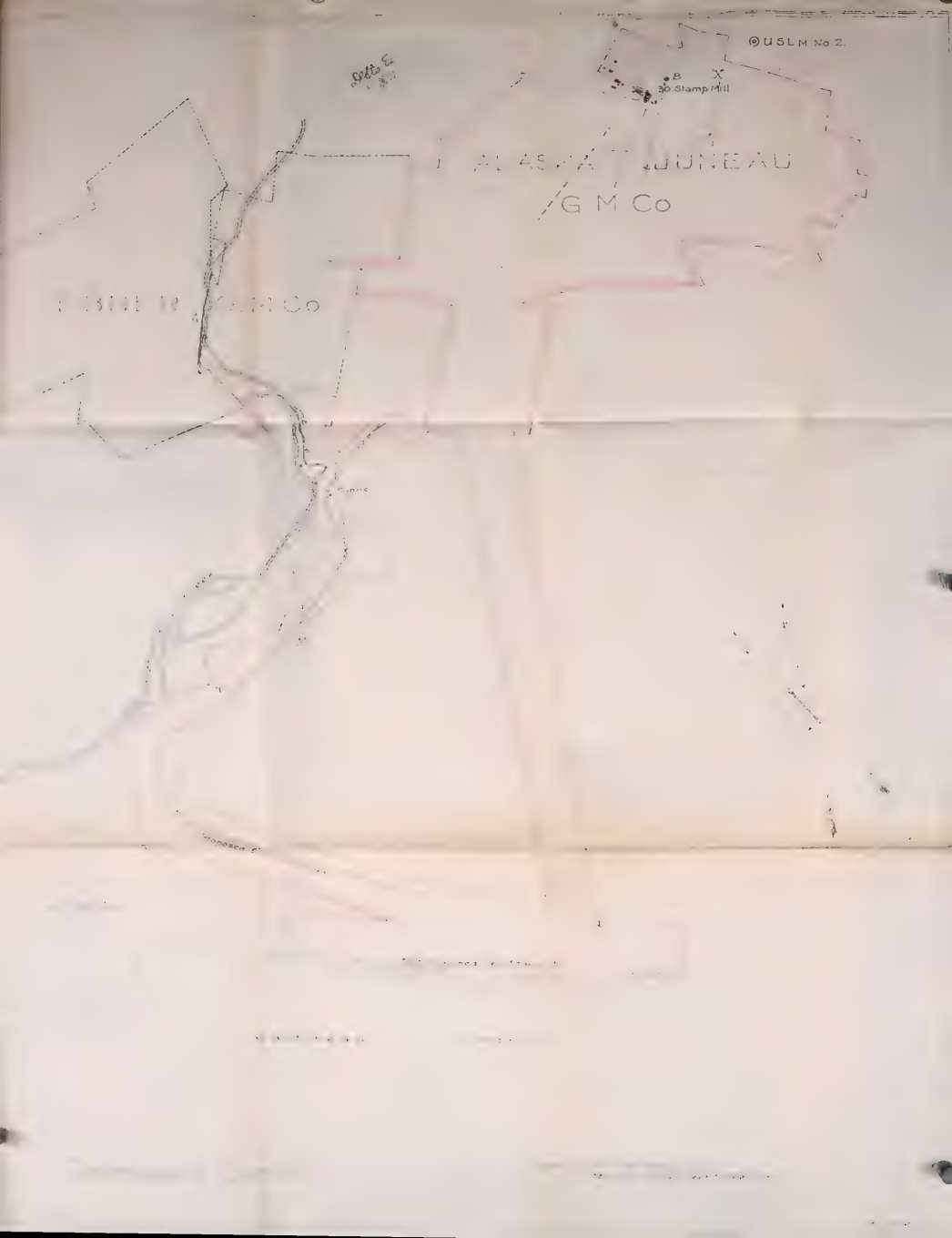

GASTINEAU CHANNEL
AND PART OF
STEPHENS PASSAGE
S.E. ALASKA
Scale 1:40,000
SOUNDINGS IN FATHOMS
AT MEAN LOWER LOW WATER
Hydrography January 1908 and 1917
Topography
JUNEAU
DOUGLAS I.

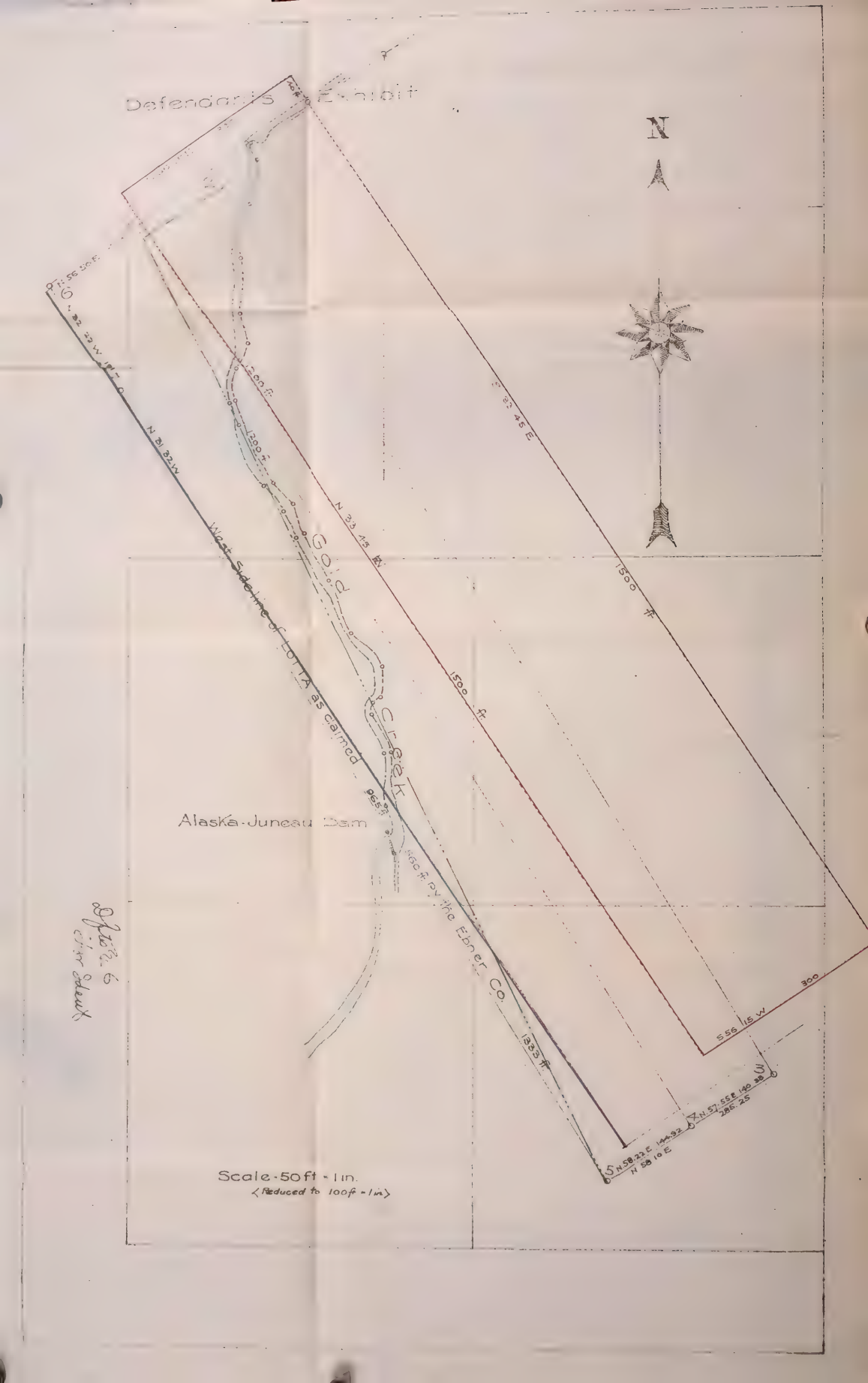


COAST AND GEODETIC SURVEY

(Gastineau Channel S.E. Alaska)

C & G S 8235


USLM No 2.
B
X
30 Stamp Mill
ALASKA JUNEAU
G M Co


Defendant's Exhibit
N
N 31 82 W
West Side line of LODA as claimed
Gold
Creek
Alaska-Juneau Dam
1500 ft
1500 ft
300
S 55 15 W
1333 ft
160 ft by the Ebner Co.
Scale - 50 ft = 1 in.
(Reduced to 100 ft = 1 in.)

DEFENDANT'S EXHIBIT #7
For Ident

CANYON

LOTTA

FORREST

Base of Falls

Lower side line of Lotta as claimed by Gaynor

Lower side line of Lotta as found

Claim of Blume

Claim of Lotta

Claim of Gaynor

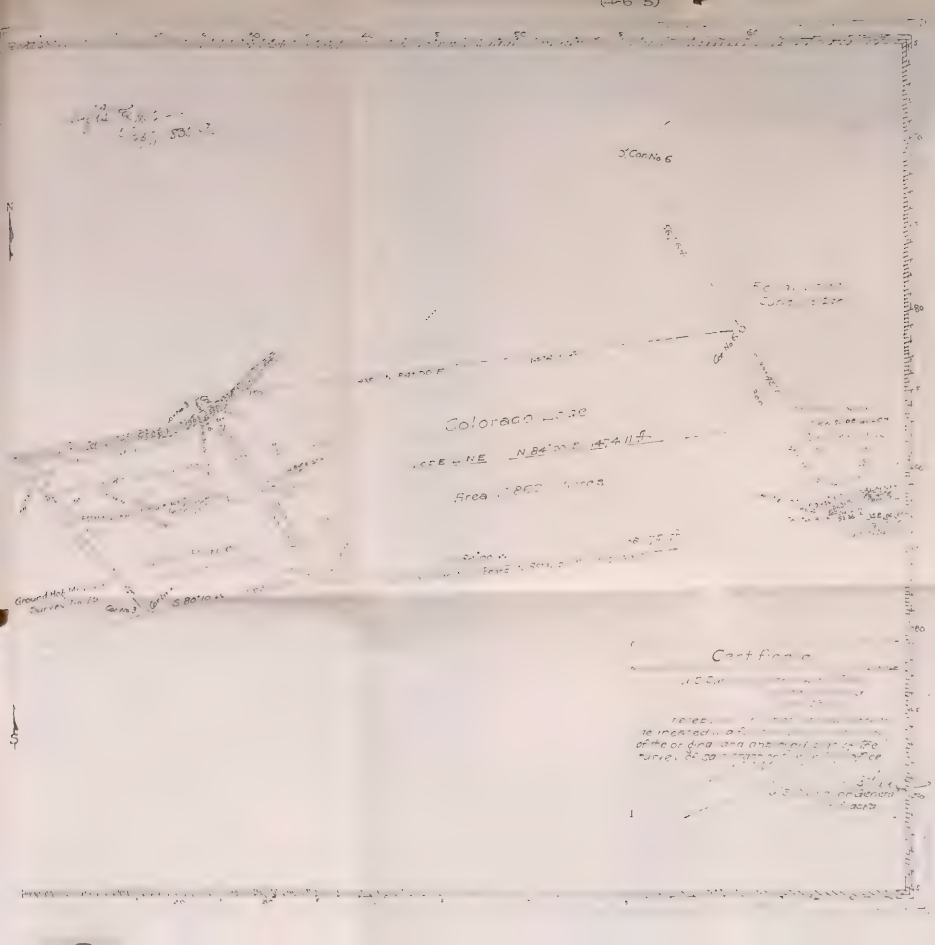
Claim of Lotta

Claim of Gaynor

Claim of Lotta

Claim of Gaynor


CAPE HORN
IDAHO
COLORADO
GOLD
Flume
Cabin
Tunnels
Borien Pit
Pipe Line
Compressor
SNOW SLIDE
GULCH
Blacksmith shop
Flume Grade
Tunnel
Boundary line determined by Surveyor and the official notes
S. 89° 00' E.
596.6
1240'
S. 57° 17' W.
307.13
N. 88° 30' W.
1123.16
1381.75
S. 84° W.
N. 83° 09' W.
1239.26
Scale - 50 feet to the inch.
(Reduced to 100 feet to the inch)



Commenced ... October 31 ... 1899 AM
Resurveyed ... November 1 ... 1899 .....
Mineral Survey No. 641 .....
Application for Survey ..... August 23 1904
Lot No. .....
Juneau, ... Land District

PLAT

OF THE CLAIM OF

Alaska Juneau Gold Mining Co ....

KNOWN AS THE

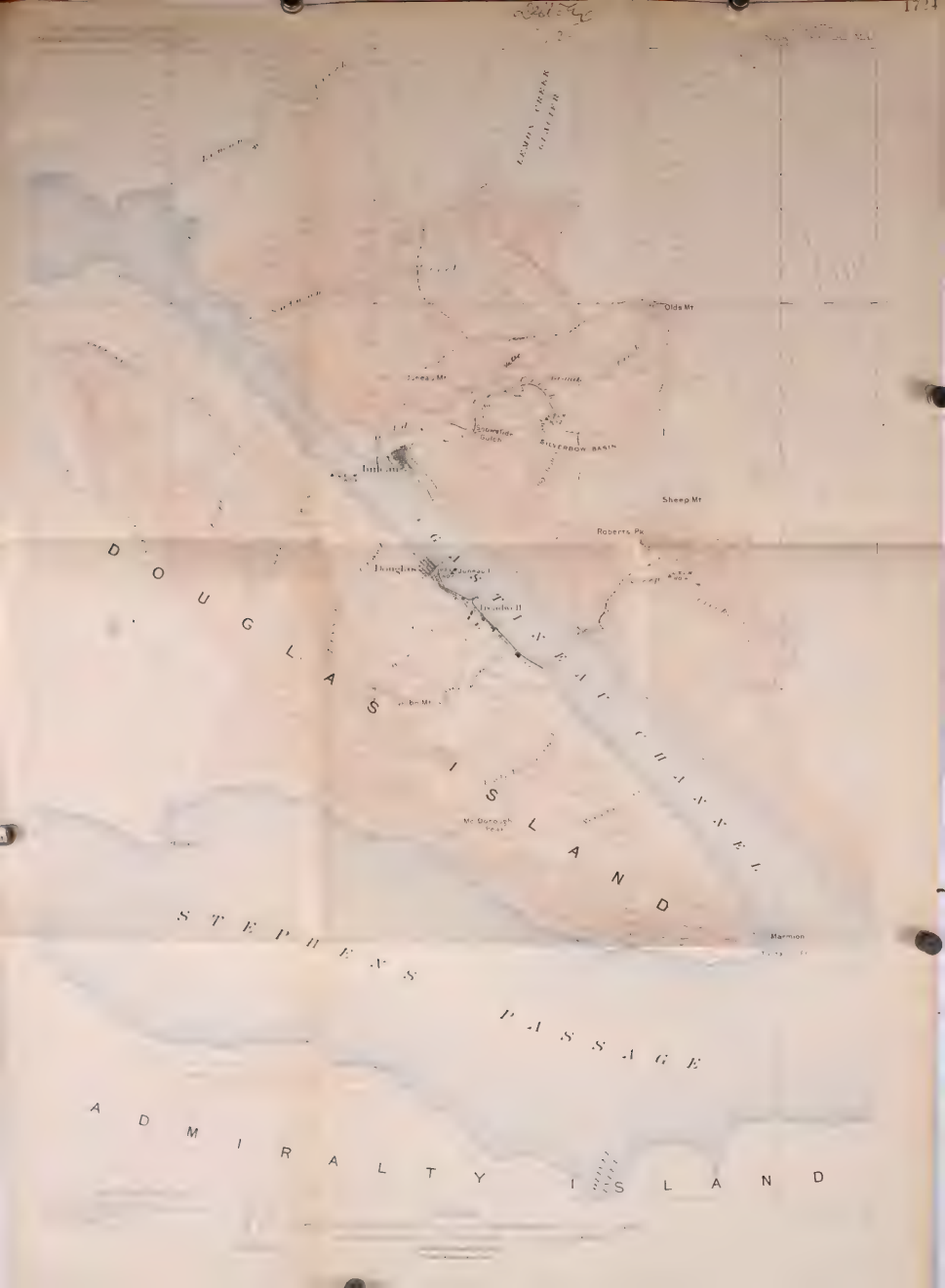
Colorado Lode Claim .....
and .....
Idaho Placer Claim .....
Harris MINING DISTRICT,
District of EQUITY Alaska .....
Containing an Area of Lode 1.867 Placer 1.807 Total 3.674 Acres.
Scale of 200 Feet to the inch
Variation 30° 00' E ...
SURVEYED September 3 to 5 ... 1904 BY
U.S. Mineral Surveyor

The Original Field Notes of the Survey of the Mining Claim of Alaska Juneau Gold Mining Company ..... Resurveyed as the Colorado Lode Claim ..... and Idaho Placer Claim ..... from which this plat has been made under my direction, have been examined and approved and are on file in this office, and I hereby certify that this plat is such an accurate delineation of said Mining Claim as well as is practicable from such notes, the premises and the whole thereof being fully represented thereon, and that sufficient reference is made thereon to natural objects or permanent monuments as will perpetuate and fix the locus thereof.

I further certify, that the undersigned claimant has expended for the benefit of each portion of said Mining Claim, and that the said improvements consist of a tunnel 6' x 6' x 50 ft long and a tunnel 6' x 6' x 50 ft long Value $ 200.00 ..... Total Value ..... $ 1000.00 that the location of said improvements is correctly shown upon this plat, and that no portion of said claim or improvements has been included in the estimate of expenditures upon any other claim.

And I hereby certify that this is a correct plat of said Mining Claim, made in conformity with said original field notes of the survey thereof, and the same is hereby approved.

U.S. Surveyor General's Office, (Signed, Wm. Wirt .....
Sitka, Alaska. .....
December 21 ... 1904 .....


Olds Mt
Sheep Mt
Roberts Pk
Douglas Island
Admiralty Island
Marmion

DESCRIPTION OF THE TOPOGRAPHIC MAP OF THE UNITED STATES

United States Geological Survey is making ... of the United States. This ... in progress since 1882 and ... the greater part of the country, including ... have been mapped. The ... United States readily can be ... the progress reports ... published in the Annual ... which is sent to libraries ... The area mapped to the end of ... 20 square miles, or about ... The maps now published ... Those ... is employed. A third and still smaller scale of ... in the ... of the far West. ... are made of ...

... times, are shown, not by full lines, but by ... dots and dashes. Roads which ... part of the year are shown by oblique parallel lines. Salt-water marshes are shown by horizontal ... with tufts of blue-grass resembling ... Fresh-water marshes and swamps by blue tufts with ... horizontal lines.

Relief is shown by contour lines, or lines of ... Each contour passes through points which ... the same altitude above the level of the sea, ... the contour lines represent to the eye the ... of the topography and determine the ... shown, but also the elevations. The line of the ... seacoast itself is a contour line, the datum or zero ... The next ... 20 feet above high tide, so that ... the valleys and forward around the points of hills. ... slope it is near it. Thus a succession of these ... surround these, just as they surround hills. Those ... by hachures, or short dashes, on the inside of the ... curve. The contour interval, or the vertical ... Certain contours, usually every fifth one, are ... level. The heights of many definite points, such ... as road corners, railroad crossings, railroad stations, ... apply, and express the elevation to the nearest foot ...

... land descriptions, as well as the descriptions and ... geodetic coordinates of triangulation stations are ... published in the annual reports and bulletins of ... the Survey. The publications pertaining to speci... area may be had on application.

The works of man are shown in black or in ... color all lettering also is printed. Boundaries, ... such as State, county, city, land-grant, reservation, ... are shown by broken lines of different ... and weights. Cities are indicated by black blocks, ... houses by small black squares. Roads are shown ... by fine double lines (full for the better roads, dot... ted for the inferior ones), trails by single dotted ... lines, and railroads by full black lines with cross ... ties. Other ... conventions which are easily understood.

The sheets ... designated by the name of a principal town or of ... some prominent natural feature within the district, ... five cents each when fewer than 100 copies are pur... ... ...

[Notice of Alaska-Juneau Gold Mining Co., of Posting of Additional Amended Notice of Appropriation of Water, etc.]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 4:45 o'clock P. M. May 8, 1911, and duly recorded in Book 10 of Placers at page 195 of the records of said District.

G. C. WINN,
District Recorder.

NOTICE IS HEREBY GIVEN, that, whereas, the ALASKA-JUNEAU GOLD MINING COMPANY did, by its agent, L. D. Mulligan, posting a notice claiming and appropriating 20,000 inches of water from the waters flowing in Gold Creek, which notice is in words and figures as follows:

"KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miners inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910."

And, whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by virtue of conveyances from said Mulligan:

Now, therefore, the undersigned, not waiving any of its rights or abandoning any of the rights belonging to it under and by virtue of said above described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling, power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold **[1589]** Creek about one mile and one-eighth (1/8) above the town of Juneau about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above mentioned loca-

tion notice, signed by L. D. Mulligan. The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyance, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgenson sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point and these waters so used on said Colorado claim will be conveyed by a pipe, flume, ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary at said last mentioned place if used for the purpose of furnishing power at that point as above stated. The remainder of the waters carried not used at this point at any time to be applied in connection with the operation of the stamp mill to be built near the Jorgenson saw mill as above stated.

NOTICE IS EXPRESSLY GIVEN, that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work it has heretofore performed looking towards **[1590]** the diversion and appropriation of the waters of Gold

Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8 day of May, 1911.

ALASKA-JUNEAU GOLD MINING COMPANY.

By ROBT. A. KINZIE,
Agent and General Superintendent.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in Book 10 of Placer, at page 195 of the records of the Juneau Recording Office.

Witness my hand and official seal this 7th day of June, 1911.

[Seal] G. C. WINN,
Commissioner and Ex-officio District Recorder.

[1591]

[Transcript of Docket Entries in U. S A. v. Mackey et al.]

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA

vs.

ANGUS MACKEY, AL BLACK, ED. SYKES, E. J. HUNSACKER, JOHN DOE, RICHARD ROE and NELS HOE.

Oct. 3, 1910. Complaint made and sworn to by Robt. A. Kinzie charging defendants with the crime

of "Assault with intent to Kill." A. P. C., sec. 18.

October 3, 1910. Warrant issued for arrest of defendants.

Oct. 3, 1910. Defendants Angus Mackey, Al Black, Ed Sykes and E. J. Hunsacker *wer* brought before the Court, complaint read to them and they were informed of their rights to the aid of counsel and witnesses. Mr. Burton appeared as counsel for the defendants. Regular hearing set for Oct. 4. 1910, 10 A. M. *Defendant* were released on bail of five hundred dollars each, B. M. Behrends, R. P. Nelson and Emery Valentine acting as sureties. Said bail was approved and accepted by the Court.

Oct. 3, 1910. Warrant returned indorsed, I hereby certify that I received the within warrant on the 3d day of October, 1910, at Juneau, Alaska, and that I served the same by arresting the within named defendants Al Black, Ed Sykes, E. J. Hunsacker and Angus McKay, and will now produce them in court.

Dated at Juneau, Alaska, Oct. 3, 1910.

H. L. FAULKNER,
United States Marshal.
By Hector McLean,
Office Deputy.

Marshal's Fees:

4 services.....$12.00

Oct. 4, 1910. Defendants with attorney appeared in court. District attorney asked that case be postponed until United States could subpoena witnesses. Subpoena issued for following witnesses, R. A. [1592] Kinzie, Albert Burch, Henry Hendrickson, Andrew Koskelo, John Peterson and Eli McKey.

Hearing postponed till 3 P. M. Defendant asked

that present bail be allowed to stand during the entire hearing which was allowed by the court.

Oct. 4, 1910, 3 P. M. Robt. A. Kinzie sworn for the plaintiff. At 5 P. M. Court adjourned to 10 A. M. Oct. 5.

Oct. 4, 1910. Subpoena returned indorsed, I hereby certify and return that I served the within Subpoena on the therein named R. A. Kinzie, Albert Burch, Henry Hendrickson, Andrew Koskelo, John Peterson, and Eli McKey personally, at Juneau, in said District, on the 4th day of October, A. D. 1910.

H. L. FAULKNER,
U. S. Marshal.
By Hector McLean,
Office Deputy.

Marshal's Fees:
6 services $4.50

October 5, 1910, 10 A. M. Albert Burch sworn for Government. At 12 noon court adjourned until 2 P. M.

Oct. 5, 1910, 2 P. M. Kennedy sworn for Government. District Attorneys announced at the completion of Mr. Kennedy's testimony that, that was the close of the government case.

Defendant were informed of their rights under the code and sec. 307 was read to them and was explained by the Court. They accepted the rights of this section and elected to be sworn and testify as witnesses in their own behalf.

Subpoena issued for defendants' witness, John Erickson.

John Erickson sworn for the defendants. At 5 P. M. court adjourned until Oct. 6 at 10 A. M.

Oct. 5, 1910. Subpoena returned indorsed, I hereby certify that I received the within subpoena on the 5 day of October, 1910, at Juneau, Alaska, and that I served the same on John Erickson on the 4th day of October at Juneau, Alaska, by reading and showing the original and [1593] delivering a ticket containing the substance thereof to the within named witness John Erickson personally and in person.

H. L. FAULKNER,
United States Marshal.
By J. F. Mullen,
Chief Office Deputy.

Dated at Juneau, Alaska, Oct. 5, 1910.

Marshal's fees: $.75.

Oct. 6, 1910, 10 A. M. F. J. Wettrick sworn for defendants. Angus Mackey sworn for defendants, E. J. Hunsacker sworn for defendants. At 12 noon court adjourned until 2 P. M.

Two P. M. Al Black sworn for defendants, Ed Sykes sworn for defendants, and Mr. Barkan sworn for defendants. Mr. Wettrick recalled to stand. At 5 P. M. court adjourned until 7:30 P. M. same evening.

7:30 P. M. Oct. 6, 1910. At conclusion of arguments of Mr. Rustgard and Mr. Burton the following order was given by the Court.

It appearing from the evidence offered in this case that a crime was committed on the 3d day of October, and that the defendants in this case committed

said crime, it is therefore ordered that they be bound over to ———

Mr. Burton asked that the defendant be admited to appear before *to* the District Court for the above-mentioned crime.

Mr. Burton asked that they be allowed to depart on the bail al*l*ready furnished in this case until the following day when the new bail could be furnished. This was allowed.

Oct. 7, 1910. Defendants appeared in court and stated that they desired to furnish bail for their appearance before the District Court. It was ordered that they be admitted to bail in the sum of five hundred dollars and that the bond should be individually and not collectively. Each furnished bail bond for the said five hundred dollars, and after the examination of the sureties B. M. Behrends, Richard Nelson and Emery Valentine by this Court as provided by statute, the *bond* were accepted and it was ordered that the defendant be *release* from the custody of this court.

I hereby certify that the foregoing is a true and complete transcript of [1594] the material docket entries as made by me in the above mentioned case and that the complaint and warrant hereto attached are the originals in said action.

[Seal] G. C. WINN.

Oct. 7, 1910. Bonds filed in the Clerk's office of the District Court. [1595]

[Complaint in U. S. A v. Mackey et al.]

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANGUS MACKEY, AL BLACK, ED. SYKES, E. J. HUNSACKER, JOHN DOE, RICHARD ROE and NELS HOE,

Defendants.

COMPLAINT—ASSAULT WITH INTENT TO KILL.

A. P. C., Sec. 18.

Comes now R. A. Kinzie, and accuses Angus Mackey, Al Black, Ed. Sykes, E. J. Hunsacker, John Doe, Richard Roe and Nels Hoe, and all and each of them, by this complaint of the crime of assault with intent to kill, committed as follows, to wit:

That the said Angus Mackey, Al Black, Ed Sykes, E. J. Hunsacker, John Doe, Richard Roe and Nels Hoe (the true names of the last three defendants above named being to complainant unknown, the said last three names being therefore fictitious names, but said last three named defendants being in company with and assisting the other defendants above named in the commission of the crime herein described, and were also known and can be recognized by Albert Burch below mentioned), on the 3d day of October, A. D. 1910, in Juneau Precinct, Division No. 1, District of Alaska,

did purposely, maliciously, willfully, unlawfully, and feloniously make an assault upon R. A. Kinzie, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry, John Peterson and Peter Nelson (the last two names being fictitious, the true names of said two last named parties being to complainant unknown), and each and *al* of them, with the intent then and there to kill them, and each of them, the said R. A. Kinzie, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry, John Peterson and Peter Nelson, by then and there so throwing, hurling, blasting, shooting and precipitating rocks [1596] with great force and violence at and upon them, the said R. A. Kinzie, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry, John Peterson and Peter Nelson, with intent then and there to kill them, and each of them, the said R. A. Kinzie, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry, John Peterson and Peter Nelson, the said rocks being of various sizes, many of them being of great size and weighing several hundred pounds, a further description of which rocks being to complainant unknown, said rocks being then and there dangerous weapons, and being then and there so thrown, hurled, blasted, shot, and precipitated by said Angus Mackey, Al Black, Ed. Sykes, E. J. Hunsacker, John Doe, Richard Roe and Nels Hoe, with sufficient force and violence to crush and kill the said R. A. Kinzie, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry, John Peterson and Peter Nelson, contrary to the statutes in such case made and provided and against the peace

and dignity of the United States of America.

ROBT. A. KINZIE.

United States of America,
District of Alaska,—ss.

I, R. A. Kinzie, being first duly sworn, depose and state as follows, to wit:

That I am a citizen of the United States over the age of twenty-one years; that I am the person who made and offered the foregoing complaint; that before signing the same I read the same and know the same to be true.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 3d day of October, A. D. 1910.

[Seal] G. C. WINN,
United States Commissioner and Ex-officio Justice of the Peace for Juneau Precinct. [1597]

[Endorsed]: U. S. Witnesses:
R. A. Kinzie, Treadwell, Alaska.
Albert Burch " "
Kennedy " "
Plaintiff's Witnesses:
John Erickson, Juneau.
F. J. Wettrick "
Angus Mackey "
Al Black "
E. J. Hunsacker "
Ed Sykes "
Barnaby "

Plaintiff's witnesses not called may be found in Transcript.

G. C. WINN,
Comr.

733–B. Filed Oct. 3, 1910. G. C. Winn, Comr. **[1598]**

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANGUS MACKEY, AL BLACK, ED SYKES, E. J. HUNSACKER, JOHN DOE, RICHARD ROE and NELS HOE,
Defendants.

Warrant [in U. S. A. v. Mackey et al.].

To the United States Marshal of the District of Alaska, Division No. 1 or any of his Deputies:

Information on oath having been made before me that the crime of assault with intent to kill in violation of Section 18 of the Alaska Criminal Code has been committed, and accusing Angus Mackey, Al Black, Ed Sykes, E. J. Hunsacker, John Doe, whose true name is unknown, and Richard Roe, whose true name is unknown, and Nels Hoe, whose true name is unknown, said names being fictitious names, and said persons are all known to and can be recognized by Albert Burch, you are therefore commanded to arrest the said Angus Mackey, Al Black, Ed. Sykes,

E. J. Hunsacker, John Doe, whose true name is unknown, Richard Roe, whose true name is unknown, and Nels Hoe, whose true name is unknown, and produce them in court that they may be dealt with according to law.

Witness my hand and official seal this 3d day of October, 1910.

[Seal] G. C. WINN,
Commissioner and Ex-officio Justice of the Peace. [1599]

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within warrant on the 3d day of October, 1910, at Juneau, Alaska, and that I served the same by arresting the within named defendants Al Black, Ed Sykes, E. J. Hunsacker and Angus McKay, and will now produce them in court.

Dated at Juneau, Alaska, Oct. 3, 1910.

H. L. FAULKNER,
United States Marshal.
By Hector McLean,
Office Deputy.

Marshal's Fees:

4 service $12.00

Filed Oct. 3, 1910. G. C. Winn. Filed Oct. 7, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. [1600]

[Deed Dated December 8, 1899—J. P. Corbus to Alaska-Juneau Gold Mining Company.]

THIS INDENTURE, made this 8th day of December, in the year of our Lord one thousand eight hundred and ninety nine.

Between J. P. Corbus of Douglas Island, the party of the first part and the Alaska Juneau Gold Mining Company, a corporation, organized under the laws of the State of California, and doing business in Alaska, the party of the second part,

WITNESSETH: That the said party of the first part for and in consideration of the sum of One Hundred Dollars ($100.00) lawful money of the United States to him in hand paid and other valuable consideration, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part and to its successors and assigns that certain placer mining claim, containing fifteen hundred linear feet on the Oregon Lode, together with surface ground three hundred linear feet in width on each side of lode line, situate near the head of the Last Chance Basin Gold Creek, in the Harris Mining District, District of Alaska, and described in the notice of location as follows:

Commencing at this notice and monument, the said monument being identical with corner No. 3, S. No. 142, Last Chance; thence N. 17.15 E. 130 feet to Cor. No. 2, S. No. 258–1500 feet to post; thence N. 84.00 E. 150 feet to post; intersect west side line Lotta S. No. 87; thence S. 33 45E. 550 feet to post on west side line of Lotta S. No. 87, thence S. 17.15

W. 970 feet to post on North side line Colorado; thence S.4.00 W. 600 feet to Cor. No. 2, S. No. 142, to the place of beginning.

Containing an area of 18 acres more or less.

Together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz, rock and earth therein and all the rights, privileges and franchises thereto incident, appendant, and appurtenant or therewith usually had and enjoyed; And also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining and the rents, issues and [1601] profits thereof.

TO HAVE AND TO HOLD all and singular the said premises together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. P. CORBUS.

Signes, sealed and delivered, in presence of

JAMES CHRISTOE.

A. N. HOFFMAN.

United States,

District of Alaska,—ss.

Before me the undersigned, a Notary Public in and for the District of Alaska, on the 8th day of December, A. D.1899, personally appeared J. P. Corbus, to me known as the person named in and who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal the day and date last above written.

[Seal] M. GRINNELL,
Notary Public for Alaska.

Filed for record at 1 P. *M.* Dec. 9, 1899.
NORMAN E. MALCOLM,
Recorder.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording Precinct, Alaska, in Book 16 of Deeds at page 425 of said records.

Witness my hand and official seal this 7th day of June, 1911.

[Seal] G. C. WINN,
Commissioner and Ex-officio District Recorder.
[1602]

In the United States Commissioner's Court for the District of Alaska, Div. No. 1, at Juneau Precinct.

UNITED STATES OF AMERICA

vs.

ANGUS MACKEY, AL BLACK, ED SYKES and E. J. HUNSACKER.

Warrant [in U. S. A. v. Mackey. et. al.].

IN THE NAME OF THE UNITED STATES OF AMERICA.

To the United States Marshal for the District of Alaska, or Any Deputy, Greeting:

Information upon oath having been this day laid *before that* the crime of attempting to destroy property belonging to the Alaska Juneau Gold Mining Company and to commit a crime against the crew of men working for said Alaska Juneau Gold Mining Company in the canyon of Gold Creek, by hurling and precipitating large quantities of rock upon said property and men, and threatening to continue said unlawful acts and purposes and to further destroy the property of said Alaska Juneau Gold Mining property and endanger the lives of said crew, and accusing Angus Mackey, Al. Black, Ed. Sykes and E. J. Hunsacker thereof, you are therefore hereby commanded forthwith to arrest the said Angus Mackey, Al. Black, Ed. Sykes and E. J. Hunsacker and bring them before me at my office at the courthouse in the City of Juneau, Alaska, there to be dealt with according to law.

[Seal] G. C. WINN,

Commissioner and Ex-officio Justice of the Peace.

Dated October 4th, 1910. [1603]

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within warrant on the 4th day of October, 1910, at Juneau,

Alaska, and that I served the same on said day and place, by arresting the within-named defendants, Angus Mackey, Al Black, Ed. Sykes and E. S. Hunsacker, and will now produce them in court.

Dated at Juneau, Alaska, Oct. 5, 1910.

H. L. FAULKNER,
United States Marshal.
By Hector McLean,
Office Deputy.

Marshal's fees:

4 services..... $12.00

[Endorsed]: Filed Oct. 5, 1910. G. C. Winn, Comr. [1604]

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANGUS MACKEY, AL BLACK, ED. SYKES and E. J. HUNSACKER,
Defendants.

Information and Complaint of Threatened Crime. [in U. S. A. v. Mackey et al.].

Comes now R. A. Kinzie, and complains to the above-entitled court, and alleges:

That he is the superintendent and general manager of the Alaska Juneau Gold Mining Company, a corporation duly authorized to carry on and transact business and own property in the District of Alaska.

That for more than one month last past said cor-

poration has been, and now is, engaged in erecting a dam and building flumes and ditches at a point on and near Gold Creek, in said precinct, division and district, known and designated as Gold Creek Canyon, situated approximately One Thousand feet below what is known as the Ebner Mill.

That for several days last past, the said defendants have been endeavoring to drive feloniously, unlawfully and forcibly this complainant and a crew of men under him in the employ of the said Alaska Juneau Gold Mining Company, a corporation, away from said premises and said dam, ditch, flume and other property and have endeavored to destroy and have partly destroyed much property in the possession of said corporation [**1605**] and belonging to it, and situated at and near the said canyon, and to that end have thrown, hurled and precipitated large quantities of rock at this complainant, Albert Burch, Henery Hendrickson, Oscar H. Hershey, O. M. Harry and other persons in the employ of said corporation with the intent and for the purpose of killing this *complaint* and the said Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry and others. That such rocks have been hurled down a steep declivity by the use of large quantities of dynamite by the said defendants and other men in their employ, or working conjointly with them; that this complainant and several of the employees of the said corporation have been struck by the rocks so hurled by said defendants and other persons working with them and whose names are to this complainant unknown.

That upon a complaint filed in this Court by this complainant during the afternoon of the 3rd day of October, 1910, said defendants were brought into court and arraigned upon a charge of assault with intent to kill this complainant, Albert Burch, Henry Hendrickson, Oscar H. Hershey, O. M. Harry and others, and were by this court released on bail; but while said defendants were so at large on bail, they hurled, shot and precipitated large quantities of rock down the said declivity and upon the works and property of said corporation in the charge of this complainant, at the point above named, and thereby and about 8 o'clock in the forenoon of this day, destroyed a flume and other property belonging to said corporation and in its possession at said point.

That Newark L. Burton, counsel for said defendants, in substance and effect, stated in open court, at about 10 o'clock, in the forenoon of this, the 4th day of October 1910, in the presence of the said defendants, that the said defendants wished an early hearing and an early disposal of their [1606] case because they desired immediately to proceed back to the place above named and continue the crime herein referred to, and this complainant verily believes that said defendants intend to continue to hurl rocks at this complainant and other employees of the said corporation for the purpose and with the intent of killing them, and for the purpose and with the intent of maliciously and feloniously destroying the property of the said corporation above described and such other property as the said corporation has in its possession on and at said premises. That in the

opinion of this complainant it is by the sheerest luck and good fortune that several men in the employ of the said corporation have not been killed or grievously injured by the said criminal and felonious acts of the said defendants and men associated with them in said crime, and that, unless this court take all lawful means to compel the defendants and the men associated or in their employ or under their direction in any way to desist from said criminal acts and hold the said defendants and all men connected with them in said acts or in any way under their command and direction on bail or sufficient bond to keep the peace, the said defendants will continue their aforementioned criminal acts and depredation and various and serious crimes will be committed by the said defendants and men in their employ and under their direction and property of great value belonging to said corporation and in its possession will be maliciously, unlawfully and feloniously destroyed by the said defendants and their associates, or men under their direction or in their employ, and persons in the employ of the said corporation will by the said defendants and such other persons as may act in conjunction with them be maliciously and feloniously killed or grievously injured. [1607]

WHEREFORE, complainant prays that the said defendants above named and such other persons as may be acting in conjunction with them as above stated, be brought before this Court, and that they be required to furnish proper security by undertaking or otherwise, in such sum as provided by law and which to this Court may seem fit and proper, to keep

the peace toward the people of the District of Alaska and particularly toward this complainant, the Alaska Juneau Gold Mining Company, a corporation, and its employees.

ROBT. A. KINZIE.

United States of America,
District of Alaska,—ss.

I, Robert A. Kinzie, being first duly sworn, depose and state as follows: That I am a citizen of the United States over the age of twenty-one years; that I am the person who made and offered the foregoing complaint and that before signing the same, I read the same and know the same to be true.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 4th day of October, A. D. 1910.

G. C. WINN,
U. S. Commissioner and ex-officio Justice of the Peace, Juneau Precinct.

[Endorsed]: Filed Oct. 4, 1910. G. C. Winn, Comr. [1608]

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA

vs.

F. J. WETTRICK.

Warrant [in U. S. A. v. Wettrick].

IN THE NAME OF THE UNITED STATES OF AMERICA.

To the United States Marshal for the District of Alaska, or any Deputy, Greeting:

Information upon oath having this day been laid before me that the crime of destroying property and accusing the within names person of committing the same, you are hereby commanded forthwith to arrest the said F. J. Wettrick and bring him before me at my office at the court house in the City of Juneau, Alaska, there to be dealt with according to law.

[Seal] G. C. WINN,

Commissioner and ex-officio Justice of the Peace.

Dated Nov. 2, 1910.

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within Warrant on the 2d day of November, 1910, at Juneau, Alaska, and that I served the same on said day and place by arresting the within-named defendant, F. J. Wettrick, and will now produce him in Court.

Dated at Juneau, Alaska, Nov. 2d, 1910.

H. L. FAULKNER,
United States Marshal.
By Hector McLean,
Office Deputy.

Marshal's Fees:

One service.. ....$2.00

[Endorsed]: Filed Nov. 2, 1910. G. C. Winn, Comm. [1609]

In the United States Commissioner's Court for the District of Alaska, Division No. 1, Juneau Precinct.

UNITED STATES OF AMERICA

vs.

AL GRAHAM, HARRY MALONEY and D. J. REARDON,

Warrant [in U. S. A. v. Graham et al.].

IN THE NAME OF THE UNITED STATES OF AMERICA.

To the United States Marshal for the District of Alaska, or any Deputy, Greeting:

Information upon oath having this day been laid before me that the crime of Willfully destroying property and accusing the within-named person of committing the same, you are therefore hereby commanded forthwith to arrest the said John Doe Richard Roe and bring him before me at my office at the courthouse in the City of Juneau, Alaska, there to be dealt with according to law.

G. C. WINN,

Commissioner and ex-officio Justice of the Peace.

Dated Nov. 1, 1910.

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within warrant on the 2d day of November, 1910, at Juneau, Alaska,

and that I served the same on said day and place by arresting the within-named defendants, Al Graham, D. J. Reardon and Harry Maloney, and will produce them now in court.

Dated at Juneau, Alaska, Nov. 3, 1910.

H. L. FAULKNER,
United States Marshal.
By John Lund,
Deputy.

Marshal's Fees:
3 services..... ....$6.00

Endorsed: Returned and filed Nov. 3, 1910. G. C. Winn, Com. [1610]

[Affidavit of M. Barrett Re Work Performed on Mining Claims.]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 2 o'clock P. M., Dec. 30, 1901, and duly recorded in book 16 of Lodes on page 231 of the records of said District.

HIRAM H. FOLSOM,
Juneau District Recorder.

United States of America,
District of Alaska,—ss.

Before me the subscriber personally appeared M. Barrett who being duly sworn, saith: That at least one hundred dollars' worth of work or improvements were performed or made upon each of the following named mining claims, situated in Harris Mining District, District of Alaska, between the 1st day of January and the 31st day of December A. D.

1901, viz.: The Idaho Lode, the Colorado, the Oregon, The Wyoming, The Nevada and the Maryland.

Such expenditure was made by or at the expense of the Alaska Juneau Gold Mining Company, owner of said claims, for the purpose of complying with the laws and holding said claims.

M. BARRETT.

Subscribed and sworn to before me this 30th day of December, A. D. 1901.

[Seal] E. F. ROSE,
Notary Public for Alaska.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording Precinct in Book 16 of Lodes, at page 231.

Witness my hand and official seal this 17th day of May, 1911.

[Seal] G. C. WINN,
U. S. Commissioner, Ex-officio Recorder. [1611]

(S)

Justice's Court for the Precinct of Juneau, Division No. 1, District of Alaska.

UNITED STATES OF AMERICA

vs.

AL GRAHAM, JOHN DOE, HARRY MALONY, RICHARD ROE, D. J. REARDON, Whose True Names are not Known.

Complaint [in U. S. A. v. Graham et al.].

Sect. 60, Chapter 3, Alaska Criminal Code.

The defendants Al. Graham, Harry Malony, D. J. Reardon and Richard Roe, whose true names are not known but who can be identified *by* IS ACCUSED by the complainant G. Campbell Jones in this complaint of the crime of Destroying Property committed as follows, to wit: The said Al Graham, John Doe and Richard Roe whose true names are Harry Malony and D. J. Reardon in the District of Alaska and within the jurisdiction of this court, did, willfully, unlawfully and on the 1st day of November, 1910, at Juneau, Alaska, *did* break, destroy and mutilate a flume, the same being then and there the property of the Alaska Juneau G. M. Co. contrary to the form to the statutes in such case made and provided and against the peace and dignity of the United States of America.

Signed—G. CAMPBELL JONES.

District of Alaska
Division No. 1,—SX.

I, G. Campbell Jones, being duly sworn deposes and say that the foregoing complaint is true as I verily believe.

G. CAMPBELL JONES.

Subscribed and sworn to before *ke* this 1st day Nov., 1910.

[Seal] G. C. WINN,
Commissioner and ex-officio J. P.

[Endorsed]: U. S. vs. Al Graham et al. Filed Nov. 1, 1910. G. C. Winn, Comr. [1612]

Justice's Court for the Precinct of Juneau, Division No. 1, District of Alaska.

UNITED STATES OF AMERICA

vs.

F. J. WETTRICK.

Complaint [in U. S. A. v. Wettrick].

Sect. 60, Chapter 3, Alaska Criminal Code.

The defendant F. J. Wettrick IS ACCUSED by G. C. Jones in this complaint of the crime of Destroying Property Committed as follows, to wit: The said F. J. Wettrick in the District of Alaska and within the jurisdiction of this court, did, willfully, unlawfully, on the 1st day of November, 1910, at Juneau Alaska, did break destroy, mutilate or cause to be broken destroyed and mutilated a flume, the same being then and there the property of the A. J. G. M. Co. contrary to the form to the statutes in such case made and provided and against the peace and dignity of the United States of America.

Signed—G. C. JONES.

District of Alaska
Division No. 1,—SX.

I, G. C. Jones, being duly sworn, deposes and say that the foregoing complaint is true as I verily believe.

G. C. JONES.

Subscribed and sworn to before *ke* this 2nd day of Nov. 1910.

[Seal] G. C. WINN,
Commissioner and ex-officio J. P.

[Endorsed]: Filed Nov. 2, 1910. G. C. Winn, Comr. [1613]

[Quitclaim Deed Dated November 6, 1910—W. R. Lindsay to Alaska-Juneau Gold Mining Company.]

THIS INDENTURE, made the 6th day of November in the year of our Lord One thousand Nine Hundred and ten, BETWEEN W. R. Lindsay the party of the first part and the Alaska Juneau Gold Mining Company, a corporation, the party of the second part:

WITNESSETH, That the said party of the first part for and in consideration of the sum of One and no/100 Dollars lawful money of the United States of America, to him in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, does by these presents remise, release and forever quit-claim unto the said party of the second part, and to its successors and assigns, the following described tract, lot or parcel of land, situated, lying and being in Harris Mining District, District of Alaska and known as the Canyon Vein or Lode Claim particularly bounded and described as follows, to wit:

Beginning at notice of location, which is situated on the left bank of Gold Creek about 50 feet up the stream from the lower Alaska Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska and r*unig* 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line

so described. This claim is bounded on its northeasterly side by the Lotta Lode Mining Claim U. S. Lot No. 87.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances unto said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has he*r*unto set his hand and seal ~~th~~

W. R. LINDSAY. [Seal]

————————. [Seal]

Signed, Sealed and Delivered in the presence of

SIMM HELLENTHAL.

W. S. BAYLESS. **[1614]**

District of Alaska,

Juneau,—ss.

THIS IS TO CERTIFY, That on this 6th day of June A/D. 1911, before me the undersigned, Notary Public in and for the District of Alaska, duly commissioned and sworn personally ~~appeared~~ came W. R. Lindsay to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the *sam* as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year

in this certificate first above written.

[Notary Seal] SIMM HELLENTHAL,
Notary Public in and for the District of Alaska Residing at Juneau, Alaska.

Filed for record at 2 P. M., June 6, 1911.

G. C. WINN,
Recorder.

Th United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the District Recorder for the Juneau Recording Precinct, District of Alaska, in Book 22 of Deeds, at page 560.

Witness my hand and official seal this 7th day of June, 1911.

[Seal] G. C. WINN,
Commissioner and ex-officio District Recorder.

[1615]

#27—Admitted

4–683.

MINERAL SURVEY NO. 641.

Lot No.....

Juneau Land District.

FIELD NOTES

Of the Survey of the Mining Claim of

THE ALASKA JUNEAU GOLD MINING COMPANY

Known as the

COLORADO LODE

Harris Mining District,

.....County, ...

Section ....., Township....., Range.....

Surveyed under instructions dated August 31, 1904.

By LLOYD G. HILL,
U. S. Mineral Surveyor.

Claim located October 31, 1899, 19

Survey commenced September 3, 1904.

Survey completed September 4, 1904. **[1616]**

FIELD NOTES OF U. S. MINERAL SURVEY No. 641.

Feet. INSTRUMENT.

Survey made with a Gurley Engineer's Transit, having a five inch needle, full compass box, variation plate reading to single minutes, a graduated circle for measuring angles independent of the

needle and reading by opposite verniers to single minutes. Instrument and steel tape, Gurley, tested and registered at the office of the U. S. Surveyor General at Sitka, Alaska.

Survey commenced September 3, 1904.

Prior to commencing this survey, I set instrument over U. S. Loc. Mon. No. 2, established August 15, 1887, in Silver Bow Basin, situate about four miles east from Juneau, and directing the telescope on the established meridian, I read the needle 30° 00′ E. of N. I then starting from U. S. Loc. Mon. No. 2 connect with Cor. No. 1, Colorado lode, Sur. No. 641, by means of a traverse line, as shown in these notes and determine the course and distance to be S. 86° 47′ W. 5817.15 ft. dist.

COLORADO LODE.

Beginning at Cor. No. 1, Colorado lode, identical with Cor. No. 4, Royal lode, Survey No. 238, whence:

S. E. Location corner Colorado lode bears S. 33° 45′ E. 77.64 Ft. dist.

U. S. Loc. Mon. No. 2, situate in Silver Bow Basin, bears N. 86° 47′ E. 5817.15 ft. dist.

Cor. No. 2 Nevada lode, Survey No. 612 bears S. 56° 15′ W. 86.30 ft.

Set a post 4 ft. long, 4 ins. sq. 2 ft. in the ground in mound of earth and stone,

marked deeply on side facing claim 1–Colorado–S–641, whence

Face of ledge, 2 ft. above ground, with cross (+) chiseled on side bears S. 16° 30′ E. 24.5 ft. dist. marked B–R–1–S–641.

No other bearings available.

Feet

Thence S. 56° 15′ W.
Var. 30° 00′ E.

Along line 2–3 Nevada lode Survey No. 612.

86.30 Cor. No. 2,

Identical with Cor. No. 2, Sur. No. 612, Nevada lode, a diorite stone 24x12x8 ins. set 6 ins. to bed rock with mound of stone, with a cross (+) cut on top, marked deeply on side facing the claim, 2–Sur–641, whence:

Face of bluff, 3x3x4 ft. above ground, marked with a cross (+) as bearing rock to Cor. No. 2, Nevada lode, Sur. No. 612, bears S. 33° 52′ E. 8.6 ft. dist. marked also BR–2–641.

No other bearings available.

Thence S. 41° 15′ E.
Var. 30° 00′ E.

Along line 2–1 Nevada lode, Sur. No. 612.

34.96 Cor. No. 3,

Set post 4 ft. long, 4 ins. sq. 2 ft. in ground in mound of stone and earth, marked

deeply on side facing claim, 3–Colorado–Sur–No–641, whence:

S. E. Location corner, Colorado bears N. 84° 00′ E. 92.36 ft. dist.

Thence S. 84° 00′ W.

Var. 30° 00′ E.

Along steep mountain side,

1381.75 Loc. Cor. No. 4,

Set post 4 ft. long, 4 ins. sq. 2 ft. in ground in mound of stone, marked deeply on side facing claim, 4–Colorado–Sur–No–641, whence:

Spruce 24 ins. diam. bears N. 52° 00′ E. 35 ft. dist. marked B–T–4–Colorado–Sur–No–641.

No other bearings available.

Thence N. 35° 45′ W.

Var. 30° 00′ E. **[1617]**

Feet

Descend mountain side.

300.00 Lode line, point of discovery bears N. 84° 00′ E. 34.11 ft. dist. Applicant for survey claiming S. 84° 00′ W. 34.11 ft. and N. 84° 00′ E. 1440.00 ft. on lode line from discovery.

312.00 Center of Pack trail from Juneau to Silver Bow Basin, course S. 58° 30′ W. and N. 58° 30′ E.

312.00 Whence mouth of Colorado tunnel, bears N. 84° 00′ E. 35 ft. dist., tunnel 6x7x30 ft. long, trending S. 34° 00′ E.

500.00 Enter Creek bottom.

550.00 Center of Gold Creek, 24 ft. wide, course S. 30° 00′ W. down stream.

600.00 Loc. Cor. No. 5,

Identical with Cor. No. 3, S–142–Last Chance. Set post 4 ft. long, 4 ins. sq. 2 ft. in ground, surrounded by mound of stone marked 5–Colorado–S–641, whence:

Granits boulder 3x4x3 ft. above ground bears N. 5° 00′ W. 27 ft. dist. marked with a cross (+) and BR–5–S–641.

Surface steep mountain side, until creek bottom is reached. Soil bed-rock, slide-rock and gravel, supporting dense undergrowth of bushes.

Thence N. 84° 00′ E.

Var. 30° 00′ E.

Along creek bottom.

110.00 Center of Gold Creek, 24 ft. wide, course S. 56° 00′ W. down stream.

150.00 Leave creek bottom and ascend mountain side.

495.00 Center of old pack trail to Silver Bow Basin, course N. 26° 00′ E. and S. 40° 00′ W.

1474.11 Loc. Cor. No. 6.

On line 4–5 Royal lode. Sur. No. 238, whence:

Cor. No. 5 Royal lode, bears N. 33° 45′ W. 567.64 ft. dist.

Set post 4 ft. long, 4 ins. sq. 2 ft. in ground in mound of stone, marked deeply on

side facing claim 6–Colorado–S–641, whence:

A rock 2½x4x3½ ft. above ground bears N. 9° 30′ E. 24 ft. dist. marked BR–6–S–641.

Feet

No other bearings available.

Surface ascending toward the south. Soil gravel, slide-rock and bed-rock, supporting dense underbrush and alder bushes.

Thence S. 33° 45′ E.

Var. 30° 00′ E.

Along line 5–4 Royal lode, Survey No. 238.

300.00 Center of snow slide gulch. 90 ft. wide, course east.

522.36 Cor. No. 1 the place of beginning.

Surface sloping toward the north. Soil slide-rock, boulders and gravel. Supporting dense undergrowth of bushes.

Containing an area of 17.862 acres.

September 4, 1904.

Courses deflected from the true meridian, determined by deflecting the angle at the established meridian as described in the foregoing field-notes.

The Colorado is bounded on the north by unknown claims, on the east by the Royal lode, Sur. No. 238 and the Nevada lode Sur. No. 612, on the S. by unknown claims, on the W. by the Idaho placer of this survey. The established monuments of this survey are identical with

the respective stakes as found on the ground with the exception of corners 1, 2 and 3 of the Colorado lode, where the ground in conflict with the Nevada lode was abandoned and any disagreement between these field notes and the certificates of location respecting the exact position of any particular corner, is due to error in the latter, excepting the S. E. location corner of the Colorado lode, which was within the Nevada lode, Sur. No. 612, and to avoid conflict was set on the Nevada side line.

EXPENDITURE OF FIVE HUNDRED DOLLARS.

I hereby certify that the value of the labor and improvements, [1618] on the claim, made for the benefit of each location in the group, and placed thereon by the Alaska Juneau Gold Mining Company or its grantors is not less than thirteen hundred and fifty dollars ($1350) and consist of 30 ft. of tunnel, 6x7 ft. in size, on the Colorado lode, costing $15 per foot ($450), and 60 ft. of tunnel on the Idaho Placer costing $15 per foot ($900).

General Description.

The ground covered by these locations is an undulating mountain side, forming the south east boundary of the Last Chance Basin. There is very little timber of any description on the surface, it being covered with a dense undergrowth of alder bushes.

The mineral was first discovered on the Colorado lode near the west end line and a small prospect tun-

nel was driven on the ore. The tunnel on the Idaho Placer is 60 ft. long in auriferous gravel and slide-rock which required timbering. The development work consists of the two tunnels, shown on the plat and described in the foregoing field notes of this survey,

LLOYD G. HILL,
U. S. Deputy Mineral Surveyor. **[1619]**

Directions.—1. Carry out the area in acres to three decimals, and all other calculations to two decimals only.

2. In balancing Lat. and Dep. do not obliterate or change the original figures:

Put the corrected figure or figures above in red ink. Do not change the footing of the original figures, but put below them the corrected footing in red ink.

The corrections for balancing fallings should be proportional to the lengths of the lines.

3. In calculations of fallings take result to nearest hundredth. In calculations of N. and S. areas drop all after second decimal. Surveyors are advised to use the Standard Field Tables issued by G. L. O.

TABLING AND CALCULATIONS OF AREA OF THE COLORADO LODE.

No.	Course.	Distance.	Latitudes. North.	Latitudes. South.	Departures. East.	Departures. West.	Double M. D.	N. Areas.	S. Areas.
		Feet							
1.	S. 56° 15′ W.	86 30		47 95		71 76	3440 72		164982 52
				7*					
2.	S. 41° 15′ E.	34 96		26 28	23 05		3392 01		89108 10
						9*			
3.	S. 84° 00′ W.	1381 75		144 43		1374 18	2040 87		294762 85
4.	N. 33° 45′ W.	600 00	498 88			333 34	333 34	166296 66	
5.	N. 84° 00′ E.	1474 11	154 09		1466 03		1466 03	225900 56	
6.	S. 33° 45′ E.	522 36		434 32	290 21		3222 27		1399496 31
			652 97	652 98	1779 29	1779 28		392197 22	1948349 78
				652 97*		1779 29*			392197 22
								2	1556152 56
							435 60		778076 28
									178 62 Acres.

Traverse From Cor. 1 Colorado Lode to U. S. L. Mon. No. 2.

1.	S. 33° 45′ E.	30 00		24 94	16 67			From Cor. 1 Colorado to line Alaska Juneau Tunnel
2.	East.	4740 00			4740 00			Along line Alaska Juneau Tunnel.
3.	N. 71° 31′ E.	1108 49	351 43		1051 31			From Alaska Juneau Raise to U. S. L. M. No. 2
4.	S. 86° 47′ W.	5817 15		326 41		5807 98		Course & Distance From U. S. L. M. No. 2 to Cor. 1 Colorado.
			351 43	351 35	5807 98	5807 98		

*In red ink.

4—685.

FINAL OATHS FOR SURVEYS.

LIST OF NAMES.

A list of the names of the individuals employed by Lloyd G. Hill, United States Mineral Surveyor, to assist in running, measuring, and marking the lines, corners, and boundaries described in the foregoing field notes of the survey of the mining claim of The Alaska Juneau Gold Mining Company known as the Colorado lode and showing the respective capacities in which they acted.

A. L. PREBLE, Chainman.
J. A. SNOW, Chainman,
CHRISTIAN KROUGH, Axman.
————————, Flagman.

FINAL OATHS OF ASSISTANTS.

We, A. L. Preble, J. A. Snow and Christian Krough, do solemnly swear that we assisted Lloyd G. Hill, United States Mineral Surveyor, in marking the corners and surveying the boundaries of the mining claim of The Alaska Juneau Gold Mining Company, known as the Colorado lode, represented in the foregoing field notes as having been surveyed by said mineral surveyor and under his direction; and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monuments established according to law and the instruc-

tions furnished by the United States Surveyor-General for Alaska.

A. L. PREBLE, Chainman.
J. A. SNOW, Chainman,
CHRISTIAN KROUGH, Axman.
————————, Flagman.

Subscribed and sworn to by the above-named persons before me this eleventh day of October, 1904.

[Seal] E. T. ROSE,
Notary Public for Alaska. [1621]

4—686.

FINAL OATH OF U. S. MINERAL SURVEYOR.

I, Lloyd G. Hill, U. S. Mineral Surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for Alaska, dated August 31, 1904, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said Surveyor General, faithfully and correctly executed the survey of the Mining Claim of The Alaska Juneau Gold Mining Company, known as the Colorado lode, situate in Harris Mining District, District of Alaska County, ————, in Section ————, Township No. ————, Range No. ————, and designated as Survey No. 641, as represented in the foregoing field notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of the location certificate, which was received by me from the Surveyor General with said instructions, and that all the cor-

ners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimant or its grantors are as therein fully stated, and that the character, extent, location, and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim has been included in the estimate of expenditures upon any other claim.

LLOYD G. HILL,
U. S. Mineral Surveyor.

Subscribed and sworn to by the said Lloyd G. Hill, U. S. Mineral Surveyor, before me H. H. Folsom, this eleventh day of October, 1904.

[Seal] H. H. FOLSOM,
U. S. Commissioner at Juneau, Alaska. [1622]

4—687.

SURVEYOR-GENERAL'S CERTIFICATE OF APPROVAL OF FIELD NOTES AND SURVEY OF MINING CLAIM.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor-General,
Sitka, Alaska, December 21, 1904.

I, U. S. Surveyor-General for Alaska, do hereby certify that the foregoing and hereto attached Field Notes and Return of the Survey of the Mining

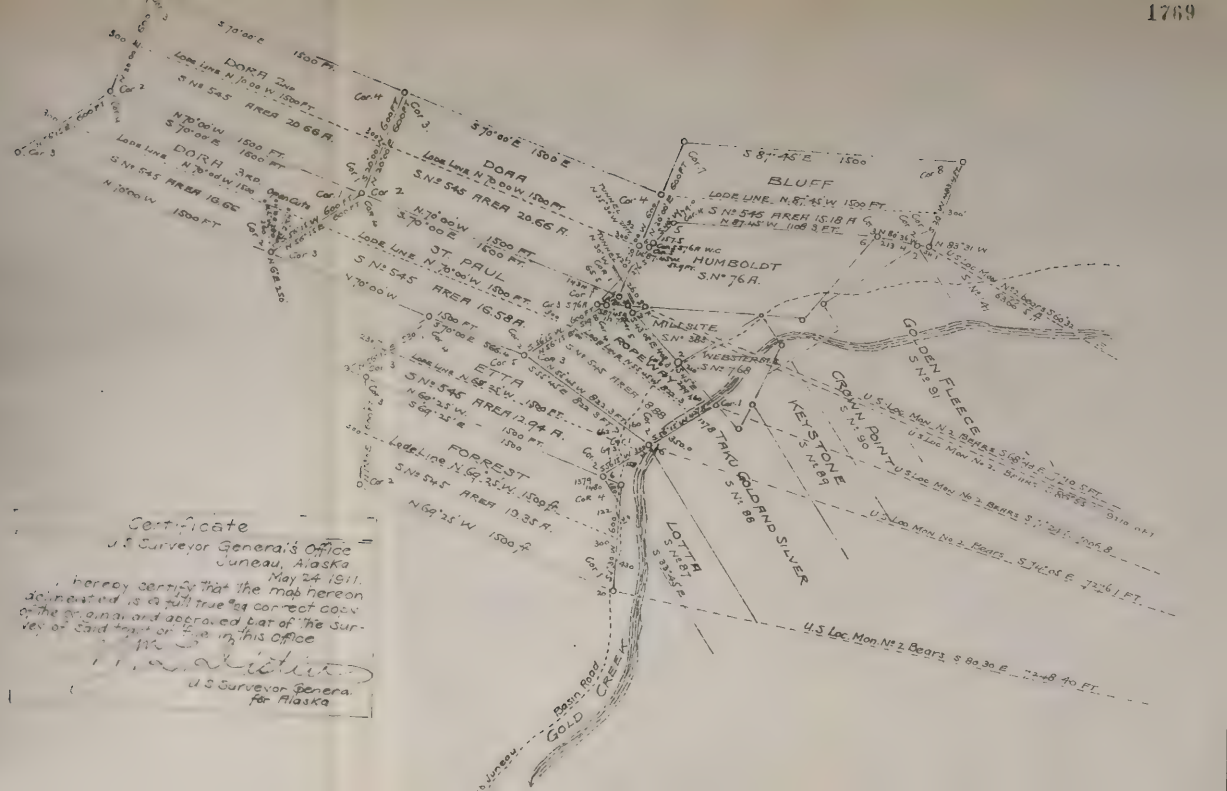
Claim of The Alaska-Juneau Gold Mining Company, known as the Colorado lode, situate in Harris mining district, Alaska, ——— County, ———, in Section ———, Township No. ———, Range No. ———, designated as Survey No. 641, executed by Lloyd G. Hill, U. S. Deputy Mineral Surveyor, September 3–4, 1904, under my instructions dated August 31, 1904, have been critically examined and the necessary corrections and explanations made, and the said Field Notes and Return, and the Survey they describe, are hereby approved. A true copy of the copy of the location certificate filed by the applicant for survey is included in the field notes.

WM. L. DISTIN,
U. S. Surveyor-General for Alaska. **[1623]**

Office of the U. S. Surveyor General,
Juneau, Alaska, May 19, 1911.

I certify that the foregoing transcript of the field notes of the survey of the Colorado lode, designated U. S. Mineral Survey No. 641 has been correctly copied from the original notes on file in this office.

WM. L. DISTIN,
U. S. Surveyor General. **[1624]**


DORA
DORA
DORA
ST. PAUL
ETTA
FORREST
BLUFF
HUMBOLDT
MILLSITE
WEBSTER
ROSE
KEYSTONE
CROWN POINT
GOLDEN FLEECE
TAKU GOLD AND SILVER
LOTTA
GOLD CREEK
Basin Road
Juneau
Certificate
U.S. Surveyor General's Office
Juneau, Alaska
May 24 1911.
I hereby certify that the map hereon delineated, is a full true and correct copy of the original and approved plat of the survey of said mine on file in this office
U.S. Surveyor General
for Alaska

[U. S. Patent for Samuel Coulter.]

U. S. PATENT FOR SAMUEL COULTER.

District of Alaska,
Juneau Recording Dist.,—ss.

The within instrument was filed for record at 11:10 o'clock May 5, 1890, and duly recorded in Book "K" on page 143 of the records of said Dist.

LOUIS L. WILLIAMS,
District Recorder.

General Land Office. Mineral Certificate.
No. 15,564, No. 16.

THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, GREETING:

WHEREAS, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and the legislation supplemental thereto, there has been deposited in the General Land Office of the United States the Plat and Field Notes of Survey and the Certificate No. 16 of the ex-officio Register of the Land Office at Sitka, Alaska, accompanied by other evidence whereby it appears that Samuel Coulter did, on the Tenth day of June, A. D. 1889, duly enter and pay for that certain mining claim or premises, known as the Lotta, Takou Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel Lode Mining Claims, designated by the ex-officio Surveyor General as Lots Nos. 87, 88, 89, 90, 91, 92 and 93 respectively, in the Harris Mining District, in Alaska, in the District of Lands subject to sale at Sitka, and bounded, described and platted as follows, with Magnetic Var-

iation thirty degrees east.

Beginning for the description of Lot No. 87, at a post marked No. 1, U. S. Survey No. 87.

Thence, first course, North fifty six degrees and fifteen minutes east one hundred and fifty feet to a post marked No. 2, U. S. Survey No. 87.

Thence, second course, south thirty-three degrees and forty five minutes east one thousand five hundred feet to a post marked No. 3 U. S. Survey No. 87.

[1626]

Thence, third course south fifty six degrees and fifteen minutes west one hundred and fifty feet to a post marked No. 4, U. S. Survey No. 87, three hundred feet to a post marked No. 5 U. S. Survey No. 87.

Thence, fourth course, North thirty three degrees and forty five minutes west one thousand five hundred feet to a post marked No. 6 U. S. Survey No. 87.

Thence, fifth course, north fifty six degrees and fifteen minutes east one hundred and fifty feet to post No. 1, the place of beginning said Lot No. 87 extending one thousand five hundred feet in length along said Lotta vein or lode and containing ten acres and thirty three hundredths of an acre.

Beginning for the Description of Lot No. 88 at a post marked No. 1 U. S. Survey No. 88, from which a ten stamp mill bears south forty nine degrees and thirty minutes east one hundred and forty ~~six~~ feet distant.

Thence, first course, north fifty six degrees and fifteen minutes east one hundred and twenty seven and eighty-five hundredths feet intersect the southwest boundary line of Lot No. 76 B. at North forty five degrees west one hundred and seventy four and

nine tenths feet from post No. 1 of said claim, three hundred feet to a post marked No. 2, U. S. Survey No. 88.

Thence, second course, south thirty three degrees and forty five minutes east seventy nine and three tenths feet intersect south-east boundary line of said Lot No. 76 B at north twenty two degrees and thirty minutes east one hundred and sixty six feet from post No. 1 of said claim, eight hundred feet to a point from which tunnel No. 1 bears south nineteen degrees east thirty five feet distant, and tunnel No. 2 bears south seventy degrees east seventy feet distant one thousand five hundred feet to a post marked No. 3, U. S. Survey No. 88.

Thence, third course, south fifty six degrees and fifteen minutes west three hundred feet to a post marked No. 4 U. S. Survey No. 88, from which a tunnel bears north thirteen degrees west two hundred and thirty one feet distant, six hundred feet to a post marked No. 5 U. S. Survey No. 88, being also post No. 3 of Lot No. 87, hereinbefore described. **[1627]**

Thence fourth course, north thirty three degrees and forty-five minutes west one thousand five hundred to a post marked No. 6 U. S. Survey No. 88, being also post No. 2 of said Lot No. 87.

Thence, fifth course, north fifty six degrees and fifteen minutes east three hundred feet to post No. 1, the place of beginning; said Lot No. 88 extending one thousand five hundred feet in length along said Takou Gold and Silver vein or lode, and containing exclusive of the conflict with said Lot No. 76 B, twenty acres and twenty hundredths of an acre.

Beginning for the description of Lot No. 89, at a post marked No. 1 U. S. Survey No. 89.

Thence, first course, north fifty six degrees and fifteen minutes east one hundred and fifty feet to a post marked No. 2, U. S. Survey No. 89.

Thence, second course, south thirty three degrees and forty five minutes east one thousand five hundred feet to a post marked No. 3 U. S. Survey No. 89.

Thence, third course, south fifty-six degrees and fifteen minutes west one hundred and fifty feet to a post marked No. 4 U. S. Survey No. 89, three hundred feet to a post marked No. 5, U. S. Survey No. 89, being also post No. 3 of Lot No. 88, hereinbefore described.

Thence, fourth course, north thirty three degrees and forty five minutes west one thousand four hundred and twenty feet and seven tenths feet intersect south east boundary line of said Lot No. 76 B. one thousand five hundred feet to a post marked No. 6 U. S. Survey No. 89; being also post No. 2, of said Lot No. 88.

Thence, fifth course, north fifty six degrees and fifteen minutes east one hundred and eighteen and sixty five hundredths feet intersect south east boundary line of said Lot No. 76 B. at North twenty two degrees and thirty minutes east three hundred and eight and seven tenths feet from post No. 1 of said claim, one hundred and fifty feet to post No. 1, the place of beginning, said Lot No. 89 extending one thousand five hundred feet in length along said Keystone vein or lode and containing, exclusive of the conflict with said Lot No. 76 B ten acres and twenty

two hundredths of an acre. **[1628]**

Beginning for the description of Lot No. 90, at a post marked No. 1 U. S. Survey No. 90.

Thence first course, north fifty six degrees and fifteen minutes east one hundred and fifty feet intersect west side line of Lot No. 91, hereinafter described, at north thirty three degrees and forty five minutes west eight hundred and seventy eight feet from post No. 5 of said claim, two hundred and twelve feet to a post marked No. 2 U. S. Survey No. 90, from which U. S. Mineral Monument No. 2 bears south sixty five degrees and thirty seven minutes east six thousand five hundred and thirty and six tenths feet distant.

Thence, second course, south thirty three degrees and forty five minutes east eight hundred and seventy eight feet intersect south end line of said Lot No. 91, at north fifty six degrees and fifteen minutes east, sixty two feet from post No. 5 of said claim, one thousand one hundred and ten and two tenths feet intersect west side line of Lot No. 92, hereinafter described, at south forty eight degrees and forty two minutes east two hundred and forty and three tenths feet from post No. 6 of said claim, one thousand five hundred feet to a post marked No. 3, U. S. Survey No. 90.

Thence, third course, south fifty six degrees and fifteen minutes west two hundred and twelve feet to a post marked No. 4 U. S. Survey No. 90, three hundred and sixty two feet to a post marked No. 5 U. S. Survey No. 90, being also post No. 3 ~~U. S. Survey~~ of Lot No. 89, hereinbefore described.

Thence fourth course, north thirty three degree and forty five minutes west one thousand five hundred feet to a post marked No. 6, U. S. Survey No. 90, being also post No. 2 of said Lot No. 89.

Thence, fifth course, north fifty six degrees and fifteen minutes east one hundred and fifty feet to a post No. 1, the place of beginning; said Lot No. 90 extending one thousand five hundred feet in length along said Crown Point vein or lode and containing exclusive of the conflict, with said Lots Nos. 91 and 92, eleven acres and six hundredths of and acre.

Beginning for the description of Lot No. 91, at a post marked No. 1 U. S. Survey No. 91. **[1629]**

Thence, first course, north fefty six degrees and fifteen minutes east three hundred feet to a post marked No. 2, U. S. Survey No. 91.

Thence, second course, south thirty three degrees and forty five minutes east five hundred and ninety feet to post No. 8 of Lot No. 93 hereinafter described, one thousand and forty feet to a post marked No. 3, U. S. Survey No. 91, being also post No. 2 of said Lot No. 92.

Thence, third course, south fifty six degrees and fifteen minutes west three hundred feet to a post marked No. 4, U. S. Survey No. 91, five hundred and thirty eight feet intersect east side line of said Lot No. 90, six hundred feet to a post marked No. 5 U. S. Survey No. 91.

Thence fourth course, north thirty three degrees and forty five minutes west eight hundred and seventy eight feet intersect north end line of said Lot No. 90, one thousand and forty feet to a post marked

No. 6 U. S. Survey No. 91.

Thence fifth course, north fifty six degrees and fifteen minutes east three hundred feet to post No. 1, the place of begi*n*ing; Said Lot No. 91 extending one thousand and forty feet in length along said Golden Fleece vein or lode, and containing fourteen acres and twenty three hundredths of an acre.

Beginning for the description of Lot No. 92, at a post marked No. 1 U. S. Survey No. 92, from which a tunnel bears south fifty degrees east ten feet distant.

Thence, first course, north fifty six degrees and fifteen minutes east three hundred feet to a post marked No. 2, U. S. Survey No. 92, being also post No. 3 of said Lot No. 91.

Thence second course, south forty eight degrees and forty two minutes east one thousand and fifty feet to post No. 6 of said Lot No. 93 situate on north end line of Lot No. 48, from which post No. 3 of said Lot No. 48 bears south fifty degrees west five hundred and eighty six and five tenths feet distant, one thousand one hundred and sixteen feet to a post marked No. 3, U. S. Survey No. 92.

Thence, third course, south fifty six degrees and fifteen minutes west three hundred feet to a post marked No. 4, U. S. Survey No. 92, six hundred feet to a post marked No. 5 U. S. Survey No. 92, being also post No. 3 of said Lot No. 48. **[1630]**

Thence, fourth course, north forty eight degrees and forty two minutes west eight hundred and seventy five and seven tenths feet intersect east side line of said Lot No. 90; one thousand one hundred and sixteen feet to a post marked No. 6 U. S. Survey No.

92, being also post No. 5 of said Lot No. 91.

Thence, fifth course, north fifty six degrees and fifteen minutes east sixty two feet intersect east side line of said Lot No. 90, three hundred feet to a post marked No. 1, the place of beginning; said Lot No. 92, extending one thousand one hundred and sixteen feet in length along said Grand Review vein or lode, and containing, exclusive of the conflict with said Lot No. 48, fourteen acres and forty one hundredths of an acre.

Beginning for the description of Lot No. 93, at a post marked No. 1 U. S. Survey No. 93.

Thence, first course, north fifty degrees east three hundred feet to a post marked No. 2, U. S. Survey No. 93.

Thence second course, south thirty three degrees and forty five minutes east four hundred and fifty feet to a post marked No. 3, U. S. Survey No. 93.

Thence, third course, south forty eight degrees and forty two minutes east one thousand and fifty feet to a post marked No. 4, U. S. Survey No. 93.

Thence, fourth course, south fifty degrees west three hundred feet to a post marked No. 5, U. S. Survey No. 93, six hundred feet to a post marked No. 6 U. S. Survey No. 93; situate on east side line of said Lot No. 92.

Thence fifth course, north forty eight degrees and forty two minutes west one thousand and fifty feet to a post marked No. 7, U. S. Survey No. 93; being also post No. 3 of said Lot NO. 91, and post No. 2 of said Lot No. 92.

Thence, sixth course, north thirty three degrees

and forty five minutes west four hundred and fifty feet to a post marked No. 8, U. S. Survey No. 93.

Thence, seventh course, north fifty degrees east three hundred feet to post No. 1, the place of beginning; said Lot No. 93 extending one thousand five hundred feet in length along said Jewel vein or lode and containing twenty acres and forty four hundredths of an acre. Expressly excepting and excluding "from these presents all that portion **[1631]** of the ground, hereinbefore described, embraced in said mining claims or lots Nos. 48 and 76B and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; the granted premises in said lots Nos. 87, 88, 89, 90, 91, 92 and 93, containing in the aggrate one hundred acres and eighty nine hundredths of an acre of land, more or less, as represented by "Yellow" shading on the following plat: **[1632]**

Gold Hill
Juneau
Takou Union
Cabital
Golden Fleece Sur No 91
Crown Point Sur No 90
Keystone Sur No 89
Takou Gold and Silver Sur No 88
Croppings
Lotta Sur No 87
Grant Mc
Schmeig
Scale of feet to an inch

NOW KNOW YE. That there is therefore hereby granted by the United States unto the said Samuel Coulter and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents and all that portion of the said Lotta, Takou Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel veins; lodes or ledges, and of all other veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lots Nos. 87, 88, 89, 90, 91, 92 and 93 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins; lodes or ledges shall be confined to such portions thereof as lies between the vertical planes drawn downward through the end lines of said lots Nos. 87, 88, 89, 90, 91, 92 and 93, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodges or ledges; And provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privile*d*ges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; Subject nevertheless to *to* the above mentioned and following stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premise hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts. [1634]

Third. That in the absence of necessary legislation by Congress the legislature of Alaska may provide rules for working the mining claims or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, Benjamin Harrison, President of the United States, have caused the letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifth day of February, in the year of our Lord one thousand eight hundred and ninety and of the In-

dependence of the United States the one hundred and fourteenth.

By the President:
BENJAMIN HARRISON,
[Seal] By M. McKEAN,
Secretary.
J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded Vol. 172, Pages 272 to 284, inclusive.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the District Recorder for the Juneau Recording District, District of Alaska, in Book 7 or "K" of Deeds, at page 143, records of said office.

Witness my hand and official seal this 29th day of May, 1911.

[Seal] G. C. WINN,
U. S. Commissioner and Ex-officio District Recorder,
Juneau Precinct, District of Alaska.

[1635]

[Affidavit of Michael Barrett.]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record 12 o'clock, A. M., Dec. 29, 1900, and duly recorded in book 16 of Lodes on page 2 of the records of said District.

HIRAM H. FOLSOM,
District Recorder.

United States of America,
District of Alaska,—ss.

Michael Barrett, being first duly sworn, deposes and says:

That he, assisted by Harry Hill, Neil McCush and Lee Lamprecht, did at least One Hundred (100) dollars' worth of work upon each of the following named lode claims, during the year 1900.

Said claims being situated in Silver Bow Basin, Harris Mining District, District of Alaska, and being known and designated as, the Idaho Lode Claim, Colorado Lode Claim, Oregon Lode Claim, Wyoming Lode Claim, Neveda Lode Claim, and the Maryland Lode Claim. That said work was done for and at the expense of the Alaska Juneau Gold Mining Company, the owners of said claims for the purpose of holding and developing the same, under the mining laws of the United States.

M. BARRETT.

Subscribed and sworn to before me the 29th day of Dec. 1900.

[Seal] G. M. ROSE,
Notary Public for Alaska.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording Precinct in Book 16 of Lodes at page 2.

Witness my hand and seal the ~~day an~~ 17th day of May, 1911.

[Seal] G. C. WINN,

U. S. Commissioner and ex-officio Recorder. [1637]

[Notice of Location of Takou Lode.]

Notice is hereby given that the undersigned in compliance with the requirements of the Mining Act of Congress approved May the 10th, 1872, have this day located a claim of 1500 feet linear measurement along the course of the lead Lode or Vein of Mineral bearing Quartz and 300 feet on each side of the middle of the lead, lode or vein. Situate on the East side of Gold Creek about one and a half mile up said Creek from its mouth in Harris Mining District, Alaska Territory, and more particularly described as follows, to wit—commencing at this Stake near which this notice is placed, posted; thence running 300 feet northeasterly to a Stake; thence 1500 feet northwesterly to a stake

thence 600 feet southwesterly to a Stake.

thence 1500 feet northwesterly to a Stake.

thence 600 feet southwesterly to a Stake.

thence 1500 feet southeasterly to a Stake.

thence 300 feet to the place of beginning.

R. T. HARRIS.

JOSEPH JUNEAU.

This lode and claim Shall be Known as the Takou Gold and Silver Quartz Lode; Located December 7th, 1880.

The above is a discription of the property recorded in Book A, page 56, and this is a rerecordation for

greater Safety and Notice.

R. T. HARRIS.
JOSEPH JUNEAU.

March 30th, 1881.

R. DIXON,
Recorder.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the District Recorder for the Juneau Recording Precinct in Book 1 of Lodes, at page 118.

Witness my hand and seal this 8th day of June, 1911.

[Seal] G. C. WINN,
Commissioner and ex-officio District Recorder.
[1638]

[Affidavit of Mike Barrett.]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record 2 o'clock P. M., Dec. 30, 1902, and duly recorded in book 16 of Lodes, on page 528 of the records of said District.

H. H. FOLSOM,
District Recorder.

United States of America,
District of Alaska,—ss.

Mike Barrett, being first duly sworn, deposes and says, that during the year 1902, he in conjunction

with John Mulcahy, Bert Avery, D. F. Cook and John Lehan, performed at least $900/00 worth of work and labor upon the following named group of claims to-wit:

Summit No. 1, Summit No. 2, Summit No. 3, Summit No. 4, Colorado, Oregon, Wyoming, Neveda and Maryland.

That said work and labor consisted in driving about thirty feet of tunnel as laid out and planned to be driven to cut the lodes on said claim so as to develope and work the whole as one group, the entrance to said tunnel being at a point about six hundred feet above the shore line of the northeast shore of Gastineaux Channel. That said work and labor was done and performed for and at the expense of the Alaska Juneau Gold Mining Co., the owner of said claims and for the purpose of holding and developing the same under the mining laws of the United States.

M. BARRETT.

Subscribed and sowrn to before me this 30th day of December, A. D. 1902.

[Seal] E. F. ROSE,
Notary Public for Alaska.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording Precinct, in Book 16 of Lodes at page 528.

Witness my hand and official seal, this 17th day of May, 1911.

[Seal] G. C. WINN,
U. S. Commissioner *and* [1639]

[Affidavit of Joseph MacDonald.]

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 10 o'clock, A. M., Sept. 13, 1904, and duly recorded in book 17 of Lodes on page 412 of the records of said District.

H. H. FOLSOM,
District Recorder.

United States of America,
District of Alaska,—ss.

Joseph McDonald being first duly sworn, on oath, deposes and says: That he is General *Supertindent* of the Alaska-Juneau Gold Mining Co. and was such during the years 1903 and 1904; that he knows of his own knowledge that at least $100 worth of work was done during each of said years upon each of the following named mining claims, to-wit:

The Idaho, the Colorado, the Oregon, the Wyoming, the Nevada and the Maryland; said claims being situated near the Silver Bow Basin, in Harris Mining District, Alaska; that said work for each of said years was done by and at the expense of the Alaska Juneau Gold Mining Co. owner of said claims for the purpose of holding and developing them.

JOSEPH MacDONALD.

Subscribed and sworn to before me this 3d day of September, 1904.

[Seal] J. H. COBB,
Notary Public in and for Alaska.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the Recorder for the Juneau Recording Precinct, in Book 17 of Lodes at page 412.

Witness my hand and official seal this 17th day of May, 1911.

[Seal] G. C. WINN,
U. S. Commissioner and ex-officio Recorder. [1640]

[Quitclaim Deed Dated August 2, 1910—L. D. Mulligan to Alaska-Juneau Gold Mining Company.]

KNOW ALL MEN BY THESE PRESENTS, That L. D. Mulligan, in consideration of One and no/100 ($1.00) Dollars, to him paid by the Alaska Juneau Gold Mining Company *do* hereby remise, release and forever QUITCLAIM unto the said Alaska Juneau Gold Mining Company and unto its assigns all my right; title and interest in and to the following described parcel of real estate, situate in the District of Alaska, to-wit:

A certain water right, located August 1, 1910, on Gold Creek near Juneau, Alaska, and described as follows: 20,000 miner's inches, of the waters of Gold Creek, near Juneau, Alaska, to be uses for mining,

milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice, posted on a tree, and about one *mill* from the mouth of said Gold Creek.

Said water to be diverted by ditch, pipe and flume.

TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Alaska Juneau Gold Mining Company and to its assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this second day of August, A. D. 1910.

L. D. MULLIGAN. [Seal]

Signed, Sealed, Delivered in the Presence of us as Witnesses:

C. W. RUSSEL.
R. G. DATSON.

United States of America,
District of Alaska,—ss.

This certifies, That on this 2nd day of August, A. D. 1910, before me, the undersigned, a Notary Public in and for the said District; personally appeared the within named L. D. Mulligan known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial seal the day and year last above written.

[Notary Seal] JAMES CHRISTOE.
Notary Public, residing at Treadwell.

Filed for record at 12 M. May 19, 1911. G. C. Winn, Recorder. [1641]

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the Office of the District Recorder for the Juneau Recording Precinct in Book 22 of Deeds, at page 558.

Witness my hand and official seal this 20th day of May, 1911.

[Seal] G. C. WINN,
U. S. Commissioner and ex-officio District Recorder. [1642]

Defendant's Exhibit 28—Admitted.

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 9:40 o'clock, A. M., Nov. 1, 1899, and duly recorded in book 15, Lodes on page 95 of the records of said District.

NORMAN E. MALCOLM,
District Recorder.

NOTICE OF QUARTZ LOCATION.

Notice is hereby given that the undersigned having complied with the mining act of Congress approved May 10th, 1872, and subsequent acts supplemental thereto, and the local customs, Rules and Regulations of Harris Mining District, District of Alaska, has located fifteen hundred linear feet on the

Colorado Lode, together with surface ground three hundred linear feet in width on each side of lode line for working purposes, situate near the head of the Last Chance Basin, Snow Slide Gulch, described as follows, to-wit:

Commencing at this notice and monument, the said monument being identical with cor. No. 3, So. No. 142 Thence N. 84.00 E. 1470 feet more or less to post on west side line of the Royal S. No. 238. Thence S. 33.45 E. 500 feet to Cor. No. 4, S. No. 238.600 feet to post. Thence S. 84.00, W. 1470 feet more or less to post. Thence N. 33.45 W. 600 feet to post identical with Cor. No. 3, S. No. 142 to the place of beginning, containing an area of 20 acres more or less.

Courses expressed from the true meredian magnetic variation 30.00 degrees east of North.

Corner monuments established.

This Claim shall be known as the Colorado Lode Claim.

Locator—ARCHIBALD NEVINS, Jr.

Attest:

GEO. A. HILL.

L. G. HILL.

Located on the ground this 31st day of October, 1899.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of *recods* in the office of the District Recorder for the Juneau Recording Precinct, District of Alaska.

Witness my hand and official seal this 26th day of May, 1911.

[Seal] G. C. WINN.

U. S. Commissioner and ex-officio Recorder Juneau Precinct, District of Alaska. [1643]

Defendant's 29—Admitted.

NOTICE OF LOCATION.

Notice is hereby given that the undersigned, having complied with the requirements of Chapter Six Title thirty-two of the Revised Statutes of the United States; and the local customs, laws and regulations, has located 1500 feet on the Oregon Lode, situated in the Harris Mining District, District of Alaska, and described as follows, to-wit:

Beginning at discovery post, thence South 14 degrees west, 100 feet to post #1, center of south end line lying on North side line of Colorado Lode, U. S. S. #612; thence North 84 degrees East 300 feet to post #2; thence North 14 degrees East 1500 feet to post #3; thence South 84 degrees West *6* 600 feet to post #4; thence South 14 degrees West 1500 feet to post #5, identical with corner #5 Colorado Lode; thence North 84 degrees East 300 feet to post #1.

Located July 28, 1910.

R. G. DATSON—Locator.

Attest:

F. F. SUMMERS.

I hereby certify that the foregoing is a true and correct copy of the original location notice of the Oregon Claim as recorded in Book 19 of Lodes at

page 557 of the records of the Juneau Recording Office, and that said notice of location was filed for record at 11 A. M. August 8, 1910.

[Seal] G. C. WINN,
Recorder. [1644]

Defendant's Exhibit 30—Admitted.

KNOW ALL MEN BY THESE PRESENTS, That I, R. G. Datson, in consideration of One and no/100 Dollars, to me paid by the Alaska Juneau Gold Mining Company, do hereby remise, release and forever QUIT CLAIM unto the said Alaska Juneau Gold Mining Company and unto its assigns all my right, title and interest in and to the *the* following described parcel of real estate situate in the District of Alaska, to-wit:

The Oregon Lode, situated in the Harris Mining District, District of Alaska, and described as follows:

Beginning at Discovery Post, thence south 14° W. 100 feet to post No. 1 center of south end line lying on north side line of Colorado Lode, U. S. S. No. 612, thence North 14° east 300′ to post No. 2; thence North 14° east 1;500′ to Post No. 3; thence south 84° west 600′ to Post No. 4, thence South 14° West 1;500′ to Post No. 5 identical with Corner No. 5 Colorado Lode; thence North 84° East 300′ to post No. 1.

TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Alaska Juneau Gold Mining Company and to its assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this thirtie*st* day of July, A. D. 1910.

R. G. DATSON. [Seal]

Signed, Sealed and Delivered in the Presence of us as Witnesses:

J. J. TREMMERS.
JAS. CHRISTOE.

United States of America,
District of Alaska,—ss.

THIS CERTIFIES, That on this 30th day of July, A. D. 1910, before me, the undersigned, a Notary Public in and for said District, personally appeared the within named R. G. Datson known to me to be the identical person described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year last above written.

[Notary Seal] JAMES CHRISTOE,
Notary Public, Residing at Treadwell, Alaska.

Filed for Record at 12 M. May 19, 1911. G. C. Winn, Recorder. [1645]

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the Office of the District Recorder for the Juneau Recording Precinct in Book 22 of Deeds at page 559.

Witness my hand and official seal the 20th day of May, 1911.

[Seal] G. C. WINN,
Commissioner and District Recorder. [1646]

[Notice of Appropriation of Water of Gold Creek by L. D. Mulligan.]

KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910.

District of Alaska,
Juneau,—ss.

The Within instrument was filed for record at 11 o'clock A. M. Aug. 8th, 1910, and duly recorded in book 10 Placers on page 178 of the records of said District.

(Signed) G. C. WINN,
District Recorder.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument

as it appears upon the records of the office of the District Recorder for the Juneau Recording District, of Alaska.

Witness my hand and seal this 2nd day of June, 1911.

[Seal] G. C. WINN,

Commissioner and ex-officio District Recorder.

[1647]

[Notice of Location of Lotta Mine]

LOTTA LODE.

Notice is hereby given that the undersigned has this 21st day of January 1884 in compliance with the requirements of the Act of Congress, approved May the 10th 1872 located 1500 linear feet of this lead lode or vein of Mineral bearing Quartz running 300 feet in a Southeasterly Course to a Stake at the N. W. End of the Capitol Mine and 1200 feet Northwesterly across Gold Creek to a Stake also Claiming 300 feet in width from the center of the ledge South westerly and running in width to the Takou G. & S. lode parallel with the same Northwesterly to a Stake.

Harris Mining District Alaska Ter.

This location shall be known as the Lotta Mine.

Situated one Mile and half from Juneau.

M. E. DUNN.

pd. May 24th 1884

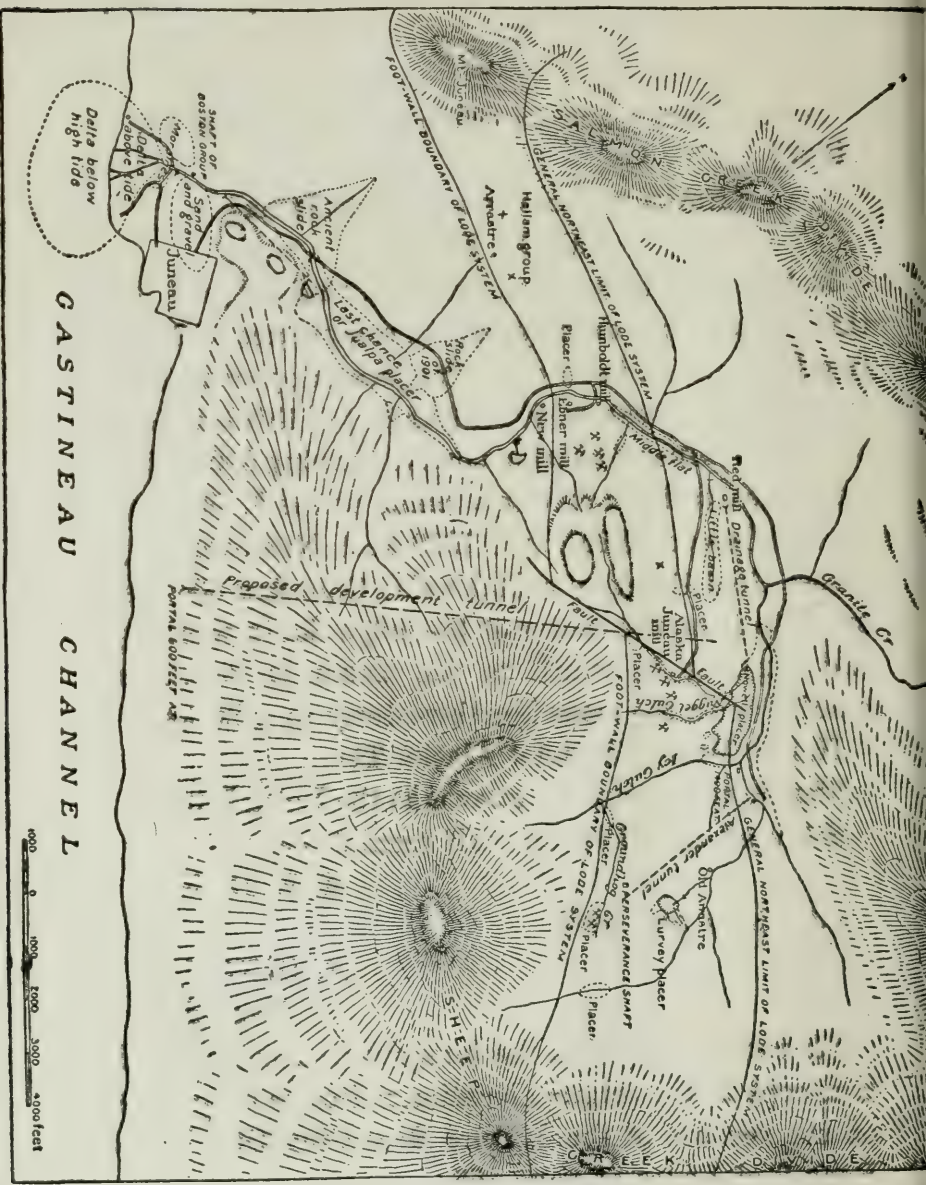
R. DIXON,
Recorder.

I hereby certify that the foregoing is a correct and true copy of the original location notice as it appears on the records of the Juneau Recording District in Book 2 of Lodes at page 166.

[Seal] G. C. WINN,

Recorder for Juneau Recording District. **[1648]**

[Sketch Map of Gold Creek, Showing Position of Principal Gravel Deposits, Rock Slides, Mines, etc., and the General Limits of the Lode System.]



Defendant's Exhibit 4 for Identification.

OREGON QUARTZ CLAIM.

NOTICE OF QUARTZ LOCATION.

Notice is hereby given that the undersigned, having complied with the Mining Acts of Congress, approved May 10th, 1872, and the subsequent Acts supplimental thereto, and the local customs, rules and regulations of the Harris Mining District, District of Alaska; has located fifteen hundred linear feet on the Oregon Lode, together with surface ground three hundred linear feet in width on each side of the lode line for working purposes, situated near the head of the Last Chance Basin, Gold Creek, described as follows, to wit:

Commencing at this monument and notice said monument being identical with cor. No. 3, S. No. 142 Last Chance, thence N. 17.15 E. 1310 feet to cor. No. 2, S. No. 258—1500 feet to post; thence N. 84.00 E. 150 feet to post intersect the west side line of the Lotta S. No. 87, thence S. 33.45 E. 550 feet to post on west side line of Lotta S. No. 87 thence S. 17.15 W. 970 feet to post on north side line Colorado; thence S. 84.00 W. 600 feet to cor. No. 3 S.—No. 142 to the place of beginning containing an area of 18 acres more or less.

Courses expressed from the true meridian magnetic variation 30.00 degrees East of North.

Corner monuments established.

This claim shall be known as the Oregon Lode Claim.

Locator: J. P. CORBUS.

Attest:

GEO. A. HILL.

L. G. HILL.

Located on the ground this 31st day of October, 1899.

Recorded 9.40 A. M. November 1st, 1899, in Book 15 Lodes on page 94.

NORMAN E. MALCOLM,
Recorder.

This is to certify that the foregoing is a true and correct copy of the original notice as it appears on the records of this office in the book and on the page above mentioned. Said copy perpared by me the Recorder for Harris Recording District, District of Alaska, on September the 7th, 1910.

G. C. WINN,
District Recorder.

Aug. 27, 1910.

Attest: This is a true copy of the certified copy.

W. S. BAYLESS. **[1650]**

[Minutes of Meeting of Miners of Harris Mining District.]

HARRIS MINING DISTRICT.

Feb. 18″ 1882.

An adjourned meeting of the miners of this District was held in the house of Wm. Newcomer at 2 O'Clock P. M.

Minutes of the meeting Feb. 8″ read and aproved.

Committee appointed at the previous meeting to report amendments to the present code of laws governing water rights & etc. made the following report.

MAJORITY REPORT.

We the undersigned committee appointed by the chairman (Mr. T. A. Wilson) of the annual meeting of the miners of Harris Mining District for the purpose of draughting amendements to the present mining laws of the District to report to an adjourned meeting to be held at the residence of W. H. Newcomer on the 18th February 1882, have the honor to respectfully submit the following for ratification.

Article 1st—Section 1st.

The right to use the runing water, flowing in a river or stream or down a cañon or ravine, may be acquired by appropriation.

Article 2nd.

The appropriation must be for some useful or beneficial purpose and when the appropriators or his successors in interest ceases to use it for such a purpose the right ceases.

Article 3rd.

The person entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flume pipe or aqueduct by which the diversion is made to places beyond that where the first use was made.

Article 4th.

The water appropriated may be turned into the channel of another stream and mingled with its water and then reclaimed but in reclaiming it the water already appropriated by another must not be

diminished. [1651]

Article 5th.

As between appropriators, the one first in time is the one first in right.

Article 6th.

A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion stating therein.

First he claims the water there flowing to the extent of (giving the number) inches measured under a four inch pressure. (Marginal note—Amended to read six inch pressure instead of four inch pressure.)

Second. The purpose for which he claims it, and the place of intended use.

A copy of the notice, must within ten (10) days after it is posted, be recorded in the Books kept by the recorder of the District.

Article 7th.

Within twenty days during the working season after notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Article 8th.

By completion" it is meant conducting the waters to the place of intended use.

Article 9th.

By a compliance with the above rules the claimants right to the *use the* water relates back to the time *the time* the notice was posted.

Article 10th.

A failure to comply with such rules deprives the

claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

Article 11th.

Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter proceed as in his title provided, or their right ceases. [1652]

Article 1st—Section 2nd.

To have Article 3rd Section 12 to read: All disputes concerning a placer mining ground and Water Rights shall be settled by arbitration during the absence of civil law, and such decision to be final.

Article 2nd.

It shall be the duty of the Recorder of the District to take the books of records and laws upon the ground in dispute, if called upon.

Article 3rd.

All arbitration must be paid by the parties who are the losers of the case in dispute at the rate of Five Dollars per day or any part thereof.

Signed—R. T. HARRIS.
PHILLIP STARR.
WILLIAM HASFORD.
S. LEWIS.

(Marginal note: Art. 3 Amended by adding, "and the Recorder when serving shall receive the same pay as arbitrators.")

MINORITY REPORT.

1st. All disputes shall be settled by miners meet-

ing or by arbitration.

2nd. Where a party has a prior location to a ditch, he is entitled to protection on said ditch, to prohibit parties from injuring said ditch by dumping tailings.

Signed—P. McGLINCHY.

(Marginal note: Made Art. 12 of Sec. 1 of amendements.)

On motion, the reports of the committee were received.

It was moved that the report of the committee be considered by sections—carried.

The majority report was then taken up.

Section 1st.

Articles First, second, third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh were adopted as read. Article sixth was amended so as to read "six inch pressure instead of four inch pressure."

Section 2nd.

Articles First and Second were adopted as read. Article Third was amended by adding. "And the Recorder when serving shall receive the **[1653]** same pay as Arbitrators.

The minority report was then taken up and the following adopted as Article 12 of Section 1st of the Amendments.

When a party has a prior location to a ditch he is entitled to protection on said ditch, to prohibit parties from injuring said ditch by dumping Tailings.

On motion, the report adopted as a whole as amended.

On motion meeting adjourned.

R. T. HARRIS,
Secretary.

T. A. WILLSON,
Chairman.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the record of a Miners Meeting as held on the 18th day of February, 1882, as the same appears of record in the District Recorder's office for the Juneau Recording Precinct in Book entitled "Minute Book, Harris Mining District, August 1881 to Feby. 1888 at pages 38 to 46 inclusive.

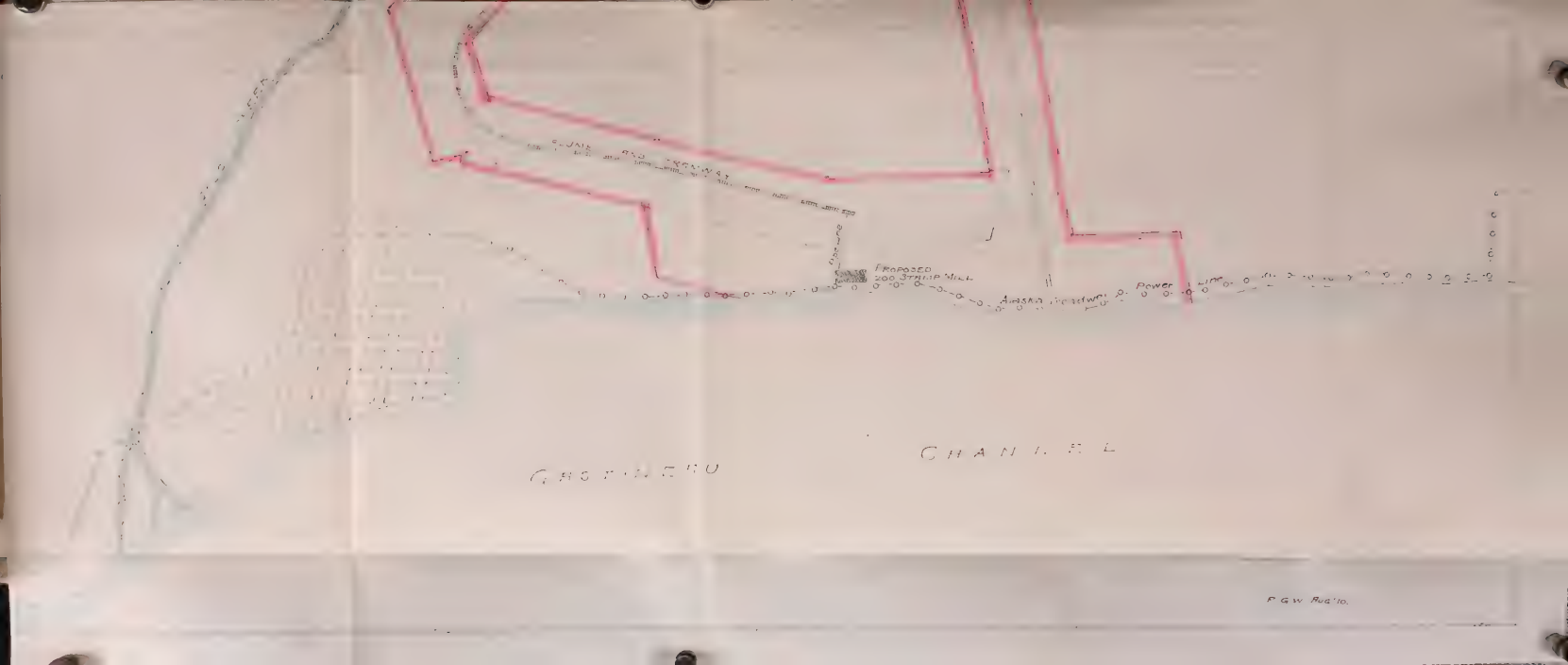
Witness my hand and official seal this 7th day of June, 1911.

[Seal] G. C. WINN,
Commissioner and ex-officio District Recorder.

[1654]



MAP
SHOWING
PROPERTY OF ALASKA JUNEAU G.M. CO.
WITH
PROPOSED IMPROVEMENTS


PROPOSED
200 STAMP MILL
CHANNEL
P.G.W. Aug'10.

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 2:40 o'clock P. M., Oct. 18, 1911, and duly recorded in book 19, Lodes, on page 582 of the records of said District.

G. C. WINN,
District Recorder.

Notice of Location [on Canyon Lode by W. R. Lindsay.]

NOTICE IS HEREBY GIVEN that the undersigned, a citizen of the United States, over twenty-one years of age, having complied with the laws of the United States and the local laws, rules and regulations of this district, has located and claims 1500 feet in length and 600 feet in width on this the Canyon Vein or lode of mineral-bearing rock described as follows: Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northeasterly side by the Lotta lode mining claim U. S. Lot No. 87.

Located this eighth day of October, A. D. 1910.

W. R. LINDSAY, Locator.

ARTHUR KUNNAS, Witness.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing is a true, correct and complete copy of the original instrument as the same appears of record in the office of the District Recorder for the Juneau Recording District, District.

Witness my hand and official seal this 2nd day of June, 1911.

[Seal] G. C. WINN,
Commissioner and ex-officio Recorder. **[1656]**



— Certificate —

U.S. Surveyor General's Office
Juneau, Alaska,
May 23, 1911.

I hereby certify that the map hereon delineated is a full, true and correct copy of the original and approved plat of the survey of said tract on file in this office.

U.S. Surveyor General for Alaska.

[Plaintiff's Exhibit "AA."]

Ebner Gold Mng. Co. v. Alaska-Juneau Gld. Mng. Co.—835–A.

(Pltffs. Exhibit "AA," being part of Stock Book of the Ebner Gold Mng. Co.)

No. 1—Certificate

For 5000 Shares

Issued to

Wm. M. Ebner.

Dated February 1, 1896.

Transferred from

Dated ————, 18——.

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Received this Certificate

————————

(All these stubs are alike with the exception of the number of certificate; number of shares; to whom issued; and date, which are as follows:)

1 to 10 are same as above, being to Ebner for 5000 each, same date as above.)

No. 11—1000 shares—same party—same date.

12 to 30 both inc., same as 11.

No. 31 to 45 both inclusive 500 shares each; same party; same date.

No. 46 to 57 both inclusive, 250 shares each; same party; same date.

No. 58 150 shares; same party; same date.

No. 59 to 64 both inclusive; 100 shares; same party; same date.

No. 65 to 76 both inclusive; 1000 shares each; issued to B. M. Behrends; dated February 1, 1896.

No. 77 & 78 250 shares each; same party; same date.

No. 79 to 90 both inclusive; 500 shares each; issued to C. W. Young; same date; After the words Received this certificate—C. W. Young.

No. 91 same party, 250 shares; balance same.

No. 92—Gus Anderson, same date; Transferred from Wm. M. Ebner; 100 shares; Under head of number certificate and shares—64–100–100; signed by Gus Anderson;

No. 93, 150 shares; Percy F. Smith; same date; transferred from Wm. M. Ebner; 58–150–150.

No. 94—Ebenezer Gay, 169 Beacon Street, Boston, Mass.; Dated March 9, 1896; from Ebner; 57–250250; dated February 27, 96.

No. 95, 100 shares; Maude J. Wilson; dated March 16, 1896; from Ebner; dated Feby 26, 1896, 63–100–100.

No. 96—500 shares; Alfred H. Fowler; dated June 3, 1896; from Ebner; dated April 1, 1896—30–1000–500;

No. 97—100 shares; same party; balance same—30–1000–100.

No. 98 & 99 same as 97.

No. 100, to Cora L. Pickering; balance same.

No. 101—Martha P. Flower; balance same.

No. 102—1000 shares; E. L. Wires; dated July 9, 1896; from Ebner; April 18, 96—24–1000–1000.

No. 103 same—25–1000–1000.

No. 104, 100 shares A. E. Scott, balance same, 60–100–100. **[1658]**

105—same 61–100–100.

106, 1000 shares, balance same 27–1000–1000.

107, 500 shares; Cecilia G. Scott; balance same, 45–500–500.

108—2000 shares; George O. Whiting balance same, 22 & 23–2000–2000.

109, 1133 shares, Louisa K. Wilson (void); dated July 9, 1896; from Ebner, same date.

No. 110, 1133 shares, Louisa K. Wilson Care Wm. Power Wilson, 53 State St. Boston, Mass. balance same, 26 & 46–1250–1133. Signed Louisa K. Wilson, by Wm. Power Wilson.

111—117 shares, to Wm. M. Ebner balance same, 46–250–117.

112, 1600 shares—Wm. Power Wilson; dated Aug. 24, 1896; from Ebner; dated April 17, 1896; 21 & 31 & 62–1600–1600.

113, 200 shares; E. W. Dixon, Brewster, New York; dated Aug. 24, 1896; from (blank) 56–250–200.

114—100 shares, to A. D. Shea, No. 2 Mt. Warren, Roxbury, Mass. Aug. 24, 96—from Ebner, same date, 56 & 111–367–100.

115—67 shares—to Ebner; balance same, 111–117–67.

116—5600 shares, to William Power Wilson; Dec. 14, 96; from Ebner, same date, 10–44–59–5600–5600.

117—1563 shares—Louisa K. Wilson—Jany 19, 1898; from Ebner, no date—28–41–42–2000–1563.

118—1562; Wm. R. Richards, 31 State St. Boston, Mass. January 98; from Ebner, Jany 19, 98; 29–43–42–2000–1562.

119, 1612; Wm. Power Wilson; January 19, 98; from Ebner and A. D. Shea, Nov. 3, 1898; 114–32–33–1850–1612.

120 113 shares to Ebner/ Jany 19, 98; from Ebner, no date—50–250113.

121—8812, W. Power Wilson; May 7, 1908; balance blank.

First certificate.

Incorporated under the laws of the State of Oregon December 3rd, 1895.

No. 10 Ebner Gold Mining Company of Juneau, Alaska. Shares 5000

Office and principal place of business. Mines and mills two miles from Juneau.

Full-paid and non-assessable.

This certifies that Wm. M. Ebner is the owner of Five Thousand Shaes of the capital stock of Ebner Gold Mining Company transferable only on the Books of the Cprporation in person or by Attorney on surrender of this certificate properly endorsed.

In Witness Whereof the President and Secretary have hereunto subscribed their names and caused its Corporate seal to be hereto affixed at Juneau, this first day of February, A. D. 1896.

WM. M. EBNER,
President.

B. M. BEHRENDS,
Secretary.

Ebner Gold Mining Co.
Juneau.
Alaska.

Lowman & Hanford Litho, Seattle. **[1659]**

Endorsed: For Value Received I hereby sell transfer and assign to Wm. Power Wilson of Boston, Mass. the shares of stock within mentioned and authorize

B. M. Behrends, Secty to make the necessary transfer on the books of the Company.

Witness my hand and seal this 14th day of December, 1896.

WM. M. EBNER.

Witnessed by
A. S. LOVETT.

Next—21.

Endorsed to Wm. Power Wilson of 53 State St Boston, Mass. Carleton Hunneman

22 To George O Whiting of Lexington Mass 18 April 96 A E Scott

23 same.

24 to E L Wires of Milford, Mass balance same

25 same as 24

26 to Louisa K Wilson of Boston Mass 9th day of July no witness

27 to A E Scott of Lexington, Mass 18th day of April 96 E L Wires

28 Louise K Wilson 19th Jany 98 no witness

29 Wm R Richards same date

30 Alfred H. Flower of 10 Holyoke St *B*ston, Mass first Apl 96 William H Sellers

31 Wm Power Wilson of 53 State St Boston, Mass 17th Apl 96 Carleton Hunneman

32 signed by Ebner only

33 Wm Power Wilson 19th day of Jany 98

41 Louise K Wilson 19th Jany 98

42 Louise K Wilson and Wm R Richards 19th of Jany 98

43 Wm Power Wilson—same
44 " of Boston Mass 14th Dec 96 A S Lovett
45 Cecilia G Scott of Lexington, Mass 18th Apl 96
46 Louise K Wilson of Lexington Mass 133 shares balance 117 shares to Wm M Ebner; 18th Apl 96
50 Part to Wm Power Wilson and 113 shares back to myself 19th day of Jany 98
56—E W Dixon 200 shares and A D Shea 50 shares; 24th Aug 96
57 Ebenezer Gay of 169 Beacon St Boston, Mass 27th Feby 96 Ferdinand Schmitz
58 Percy F Smith 1st Feby 96 W H Pyott
59 Wm Power Wilson of Boston, Mass 14th of Dec 1896 A S Lovett
60 A E Scott of Lexington, Mass 18 Apl 96
61 same
62 Wm Power Wilson of 53 State St Boston, Mass 17 Aprl 96 Carleton Hunneman
63 Maude J Wilson 26 Feby 896 Stella Mae Grocc Gus Anderson, 64—1st Feby 96 Percy F Smith
109 no endorsement
111 A D Shea 50 shares Wm M Ebner 67 shares 24 Aug 96
114 Wm M Ebner 50 shares and to Wm Power Wilson fifty of 3rd Nov 97 Chas F Gray [1660]

[Plaintiff's Exhibit "BB."]

Ebner Gold Mng. Co. v. Alaska-Juneau Gld. Mng. Co.—835–A.

Pltffs. Exhibit "BB."

By-Laws of the Ebner Gold Mining Company.

Article I.

Officers.

Section 1. The general officers of said Corporation shall be a President, Vice-President, Secretary and Treasurer; provided, however, the office of Secretary and Treasurer may be held by one and the same person; all of which said officers shall be elected by the Directors.

The stock, property, affairs and business of said corporation shall be under the care of and managed by a Board of three (3) Directors, who shall be elected annually by the stockholders from among their number, and shall hold their office one year, and until their respective successors are chosen and qualified, provided, always that the Board of Directors may appoint such other officers and agents as they deem necessary for the transaction of the business of the Corporation, to fix, limit and determine their duties and powers, and at their pleasure dismiss them or any of them.

Section 2. The principal duties of the several general officers respectively shall be as follows:—

The President shall preside at all meetings of the stockholders and of the Board of Directors; he shall sign all certificates of stock, subject to the direction of the Board of Directors; and shall sign all notes, obligations, contracts and other instruments, re-

quired to be made or executed for or on behalf of the Company, and shall exercise a general supervision over the entire stock, property, affairs and business of said Corporation and generally perform all duties usually incumbent upon such officer and do and perform all such duties as may be required of him by the Board of Directors.

Section 3. The Vice-President shall exercise all the powers and discharge all the duties of the President, in case of his absence or inability to act, and all such duties as may be required of him by the Board of Directors.

Section 4. The Secretary shall attend all meetings of the Stockholders and of the Board of Directors, both regular and **[1661]** special, and shall keep a fair and true record of the proceedings of all such meetings; he shall sign all certificates of stock and keep a record of the issuance and transfer of the same, when such transfers are properly reported to him he shall enter in the stock book all transfers of stock so as to show the name and place of residence of the parties by and to whom transferred, the number and designation of shares, and the date of transfer; he shall be the custodian of the Corporate Seal, subject to the Board of Directors; he shall attach the Corporate Seal to all documents which require sealing and which have been executed by the President, or other duly authorized officer, and shall have charge of all books, documents and papers which properly belong to his office, and generally perform all duties usually incumbent upon such office and do and perform all such duties as may be required of

him by the Board of Directors.

Section 5. The Treasurer, subject to the Board of Directors, shall safely keep the funds of the Corporation, which shall come to his hands and so only disburse the same, and generally perform all duties usually incumbent upon such office, and all such duties as may be required of him by the Board of Directors.

Article II.

Stockholders.

Stockholders only shall be members of this Corporation, and every stockholders shall be entitled, at every meeting of stockholders, to one vote for each share of stock held and owned by him, and may vote either in person or in proxy.

Article III.

Annual Meeting.

The annual meeting of the stockholders shall be held at the office of the Company, in the City of Juneau, District of Alaska, on the first Tuesday of November in each year, for the election of three (3) Directors, and the transaction of such other business as may properly come before the meeting. Special **[1662]** meeting of the stockholders may be held at the office of the Company in the City of Juneau, District of Alaska, at such time and for such purpose as the Board of Directors, or a majority of the stockholders may from time to time designate.

Article IV.

Notice of Annual Meeting.

Notice of the time and place and object of holding all stockholders' meetings shall be given by sixty

days' personal notice thereof, in writing to each stockholder as his address appears upon the books of the corporation, expressly provided, however, that any and all of such notices, may be dispensed with if all of the Stockholders are present at such meeting, either in person or by duly authorized proxy, and shall consent for such meeting upon the records of the Corporation.

Article V.

Quorum.

The members owning (?) a majority of the stock of this Corporation shall constitute a quorum at any and all meetings of the Stockholders, and shall be capable of transacting any business thereof.

Article VI.

Directors Notice.

The annual meeting of the Directors shall be held as soon as may be after their election in each year, at the office of the Company, in the City of Juneau, District of Alaska.

Article VII.

Quorum.

A majority of the Directors shall constitute a quorum for the transaction of business, at any business meeting of the Board, convened according to the By-Laws.

Article VIII.

Meeting of Directors.

The President, or majority of the Directors may at any time call a meeting of the Directors by written notice of the time and place of such meeting given to each Director, and such notice may be given in person or by mail, at least three days prior to the time

of such meeting, provided, such notice may be dispensed with if all the Directors are present at such meeting. **[1663]**

Article IX.

Certificates of Stock.

The Certificates of stock of this Corporation shall be signed by the President and Secretary and sealed with the Corporate Seal.

Article X.

Transfer of Stock.

Shares of the Capital Stock of this Company, after certificates have been issued, may be transferred in the manner provided by the Laws of the State of Oregon.

Article XI.

Execution of Contract.

All deeds and written contract made by this Corporation shall be executed in the name of this Corporation, by the President and Secretary, and when required by law be under Seal; the Secretary shall affix the Corporate Seal, provided always the Board of Directors may by resolution appoint any office of this Corporation to execute such instrument in the name of said Corporation and in its behalf.

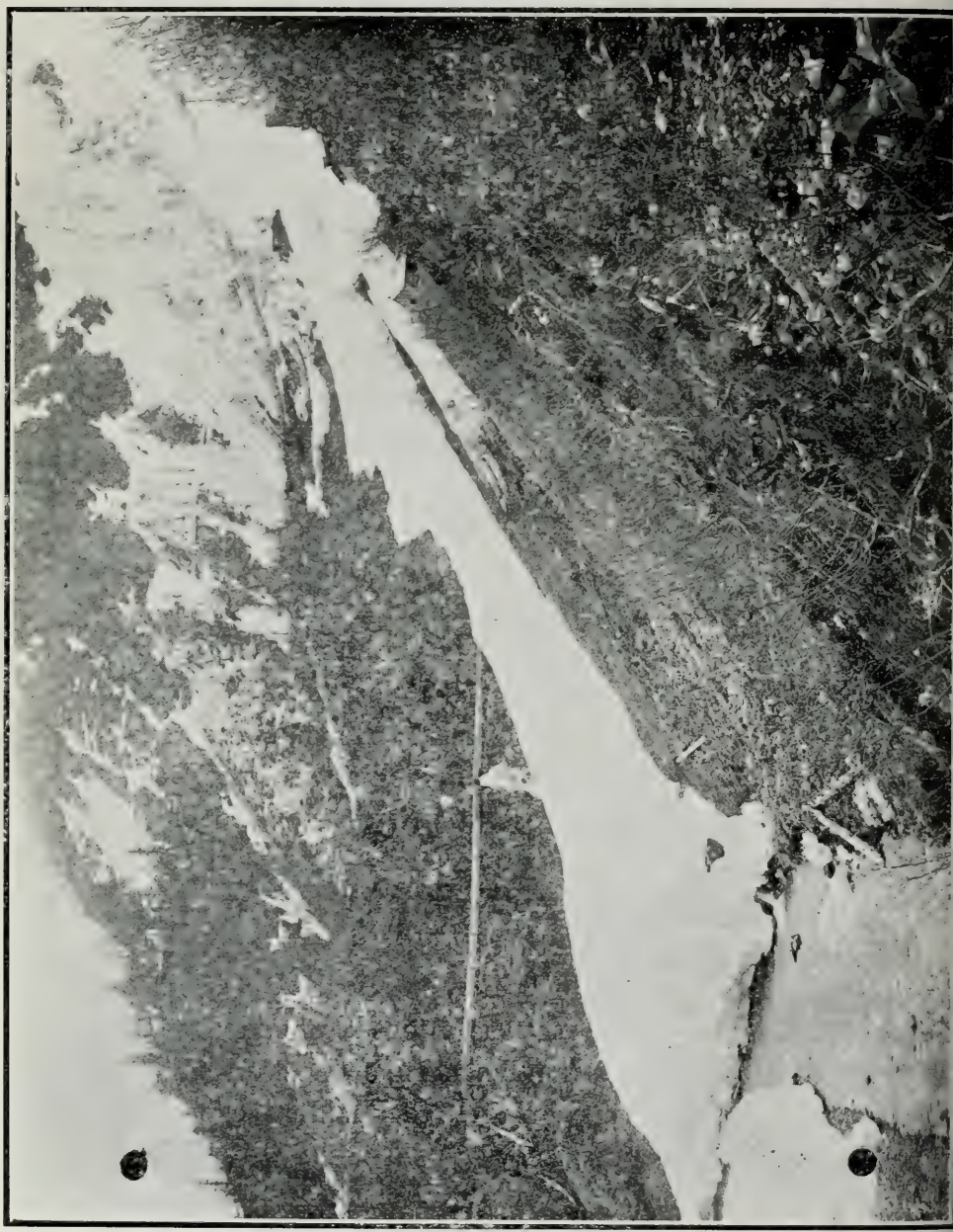
Article XII.

By-Laws.

These By-Laws, may be altered, amended or appealed (?) at any annual meeting of the stockholders, or at any meeting of the stockholders especially called for that purpose.

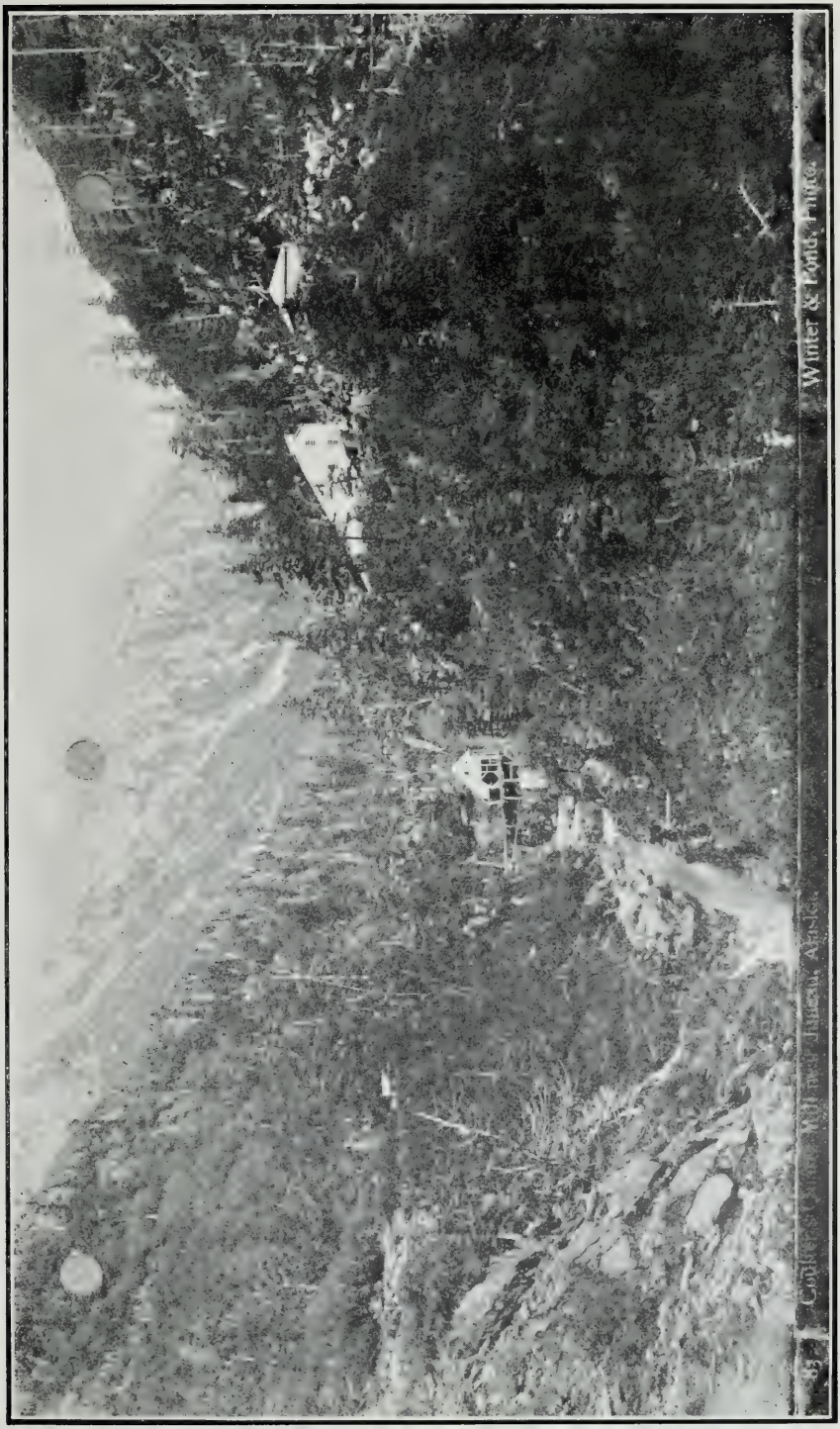
WM. M. EBNER.
B. M. BEHRENDS.
C. W. YOUNG. **[1664]**

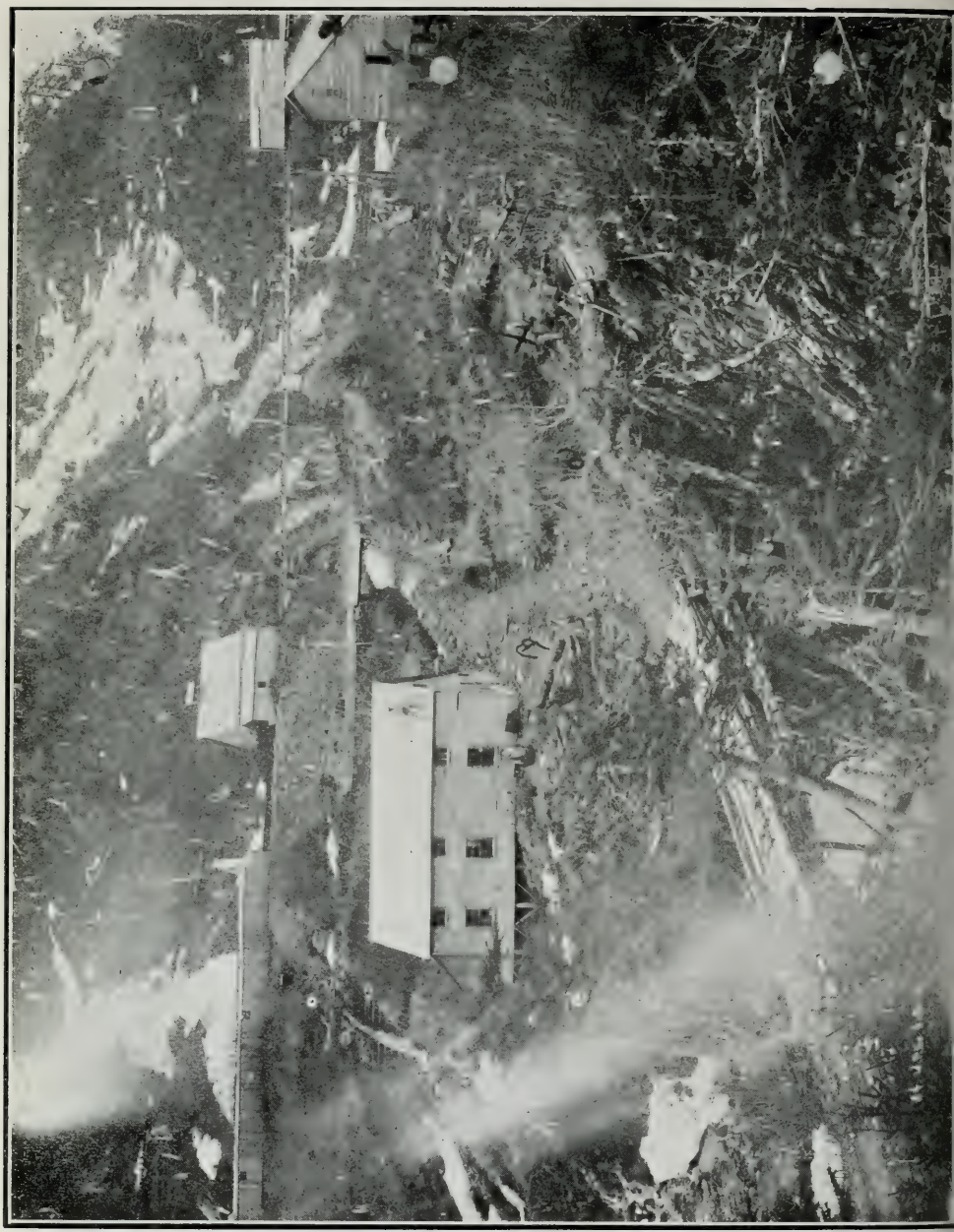
[Plaintiff's Exhibit "EE"—Admitted.]



[1665]

[Defendant's Exhibit No. 41.]





[1667]



1668]

[Plaintiff's Exhibit "FF"—Admitted.]



[1669]



870]

[Plaintiff's Exhibit "HH"—Admitted.]



[1671]

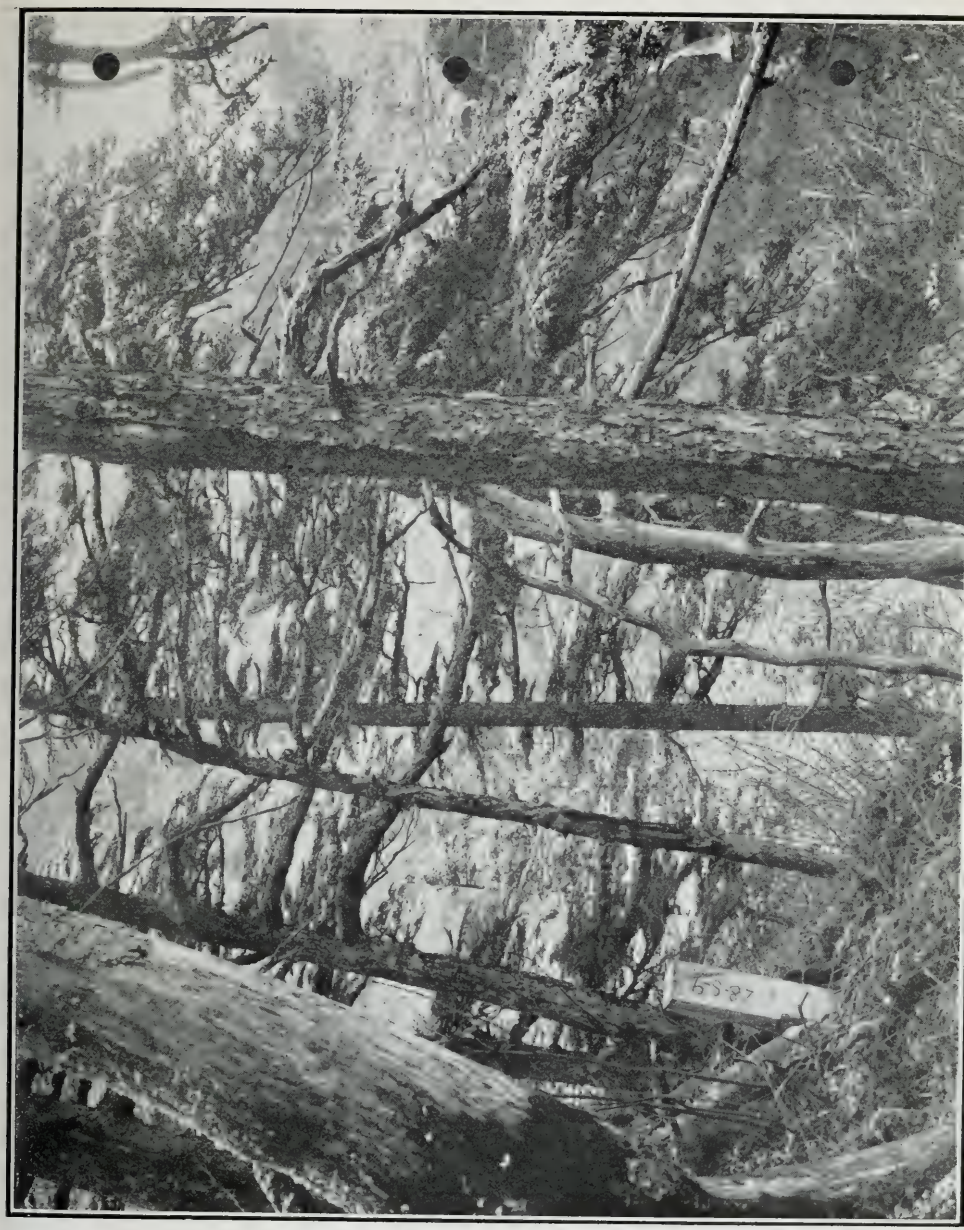
[Plaintiff's Exhibit "GG"—Admitted.]



672]



[1673]



[1674]



[1675]

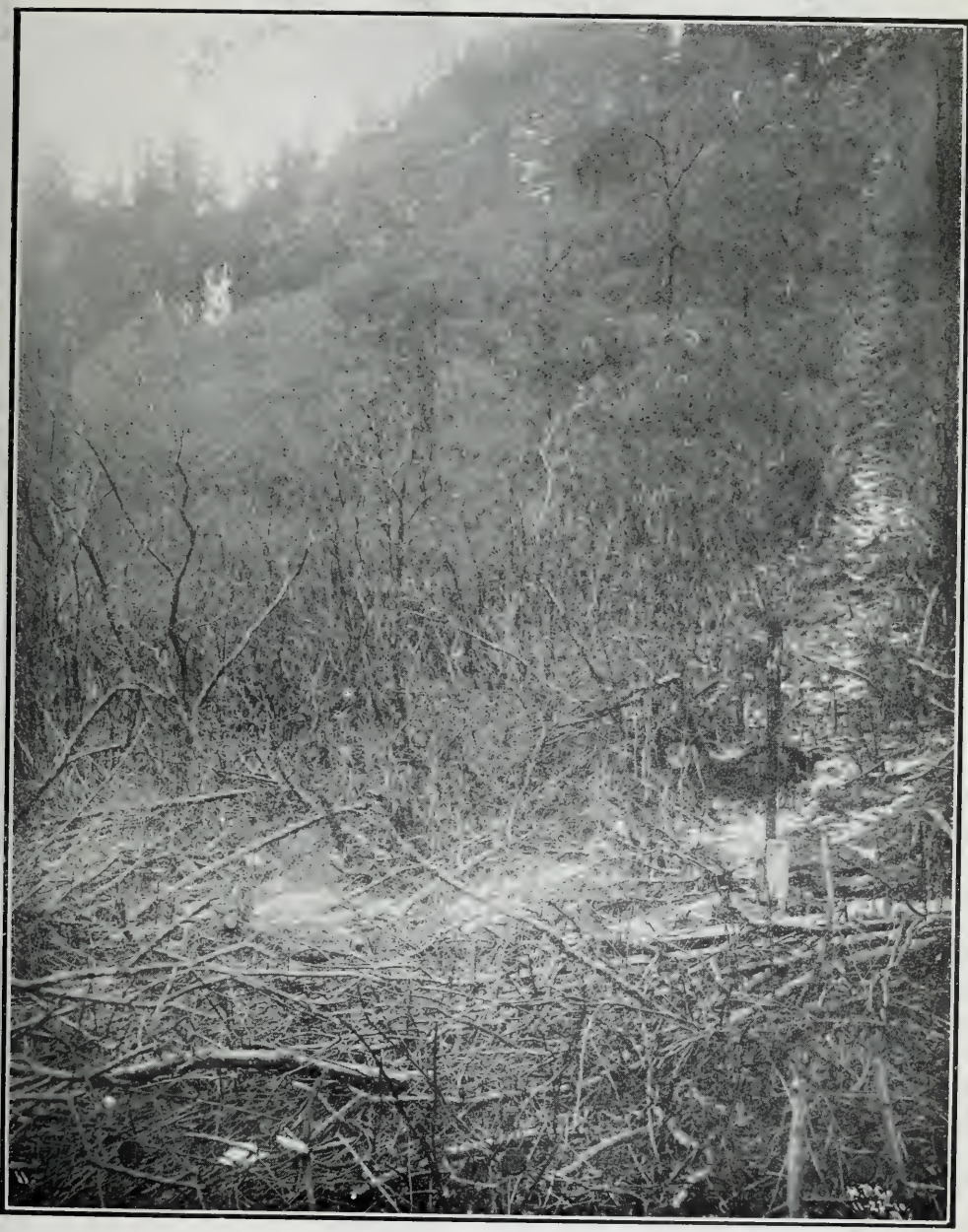


1676]



[1677]

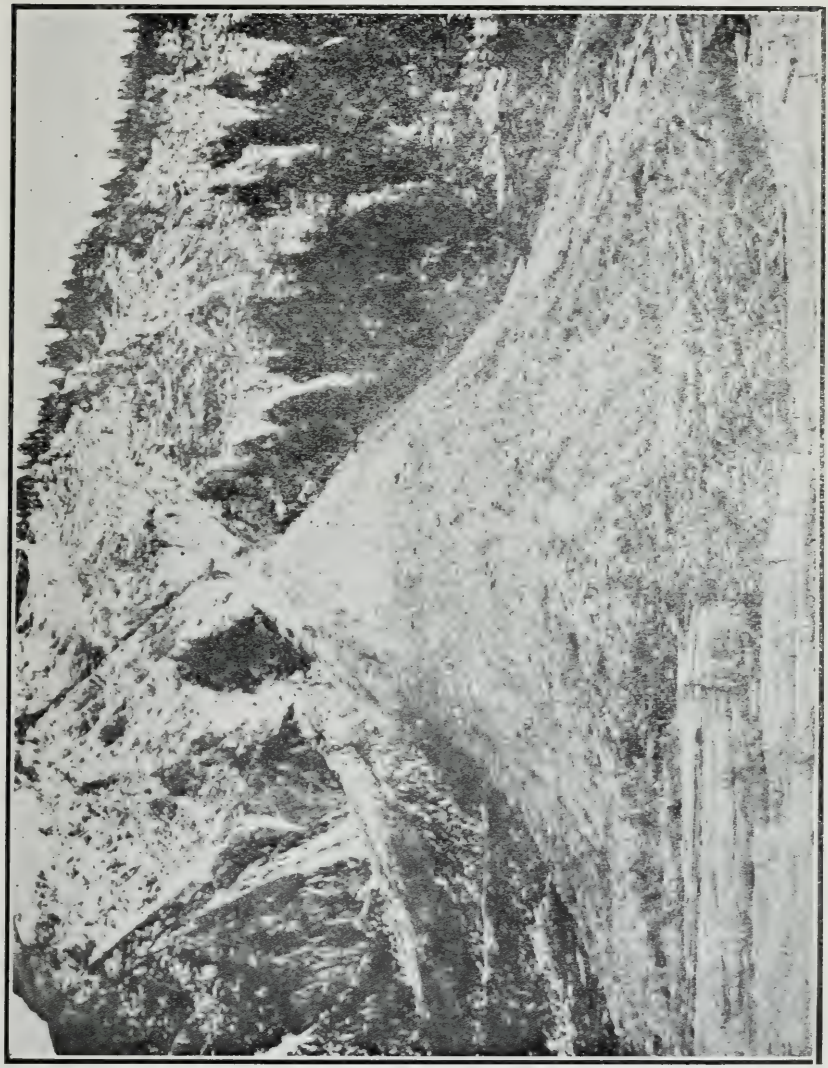
[Plaintiff's Exhibit "H" For Identification.]



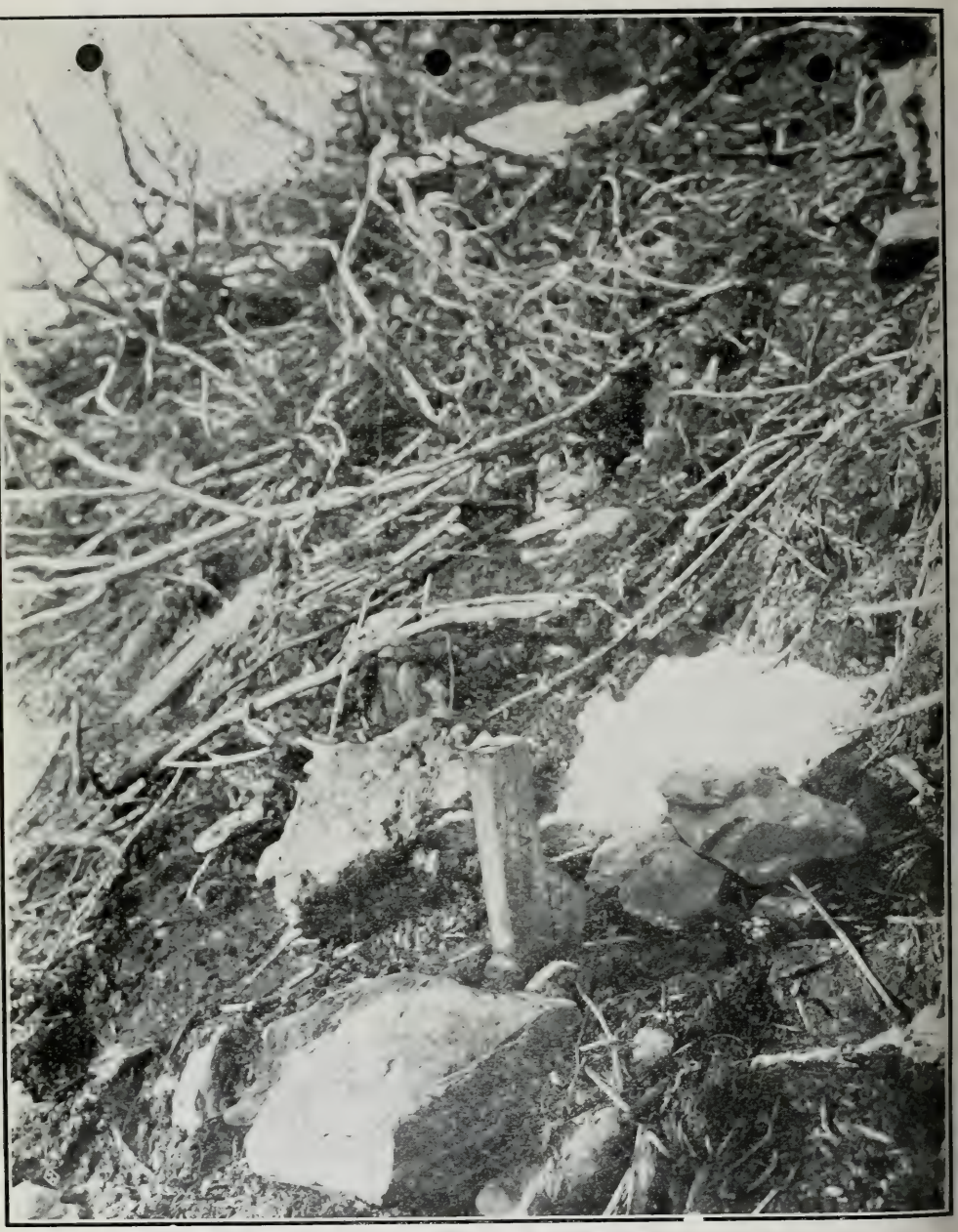
[1678]



[1679]



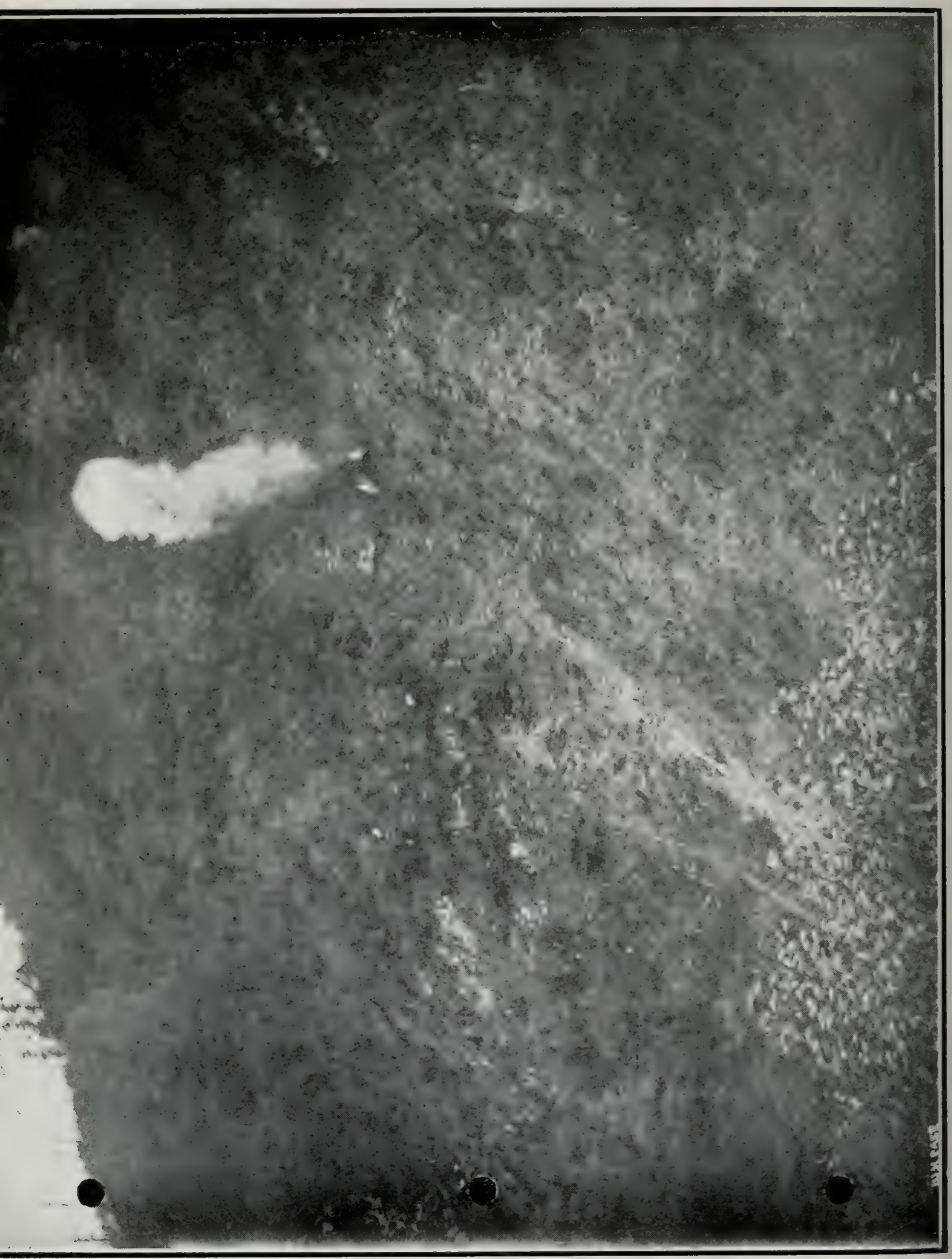
Rock Slide of 1901, Last Chance Basin, Gold Creek.



1681]



[1682]



1683]



1684]



[1685]



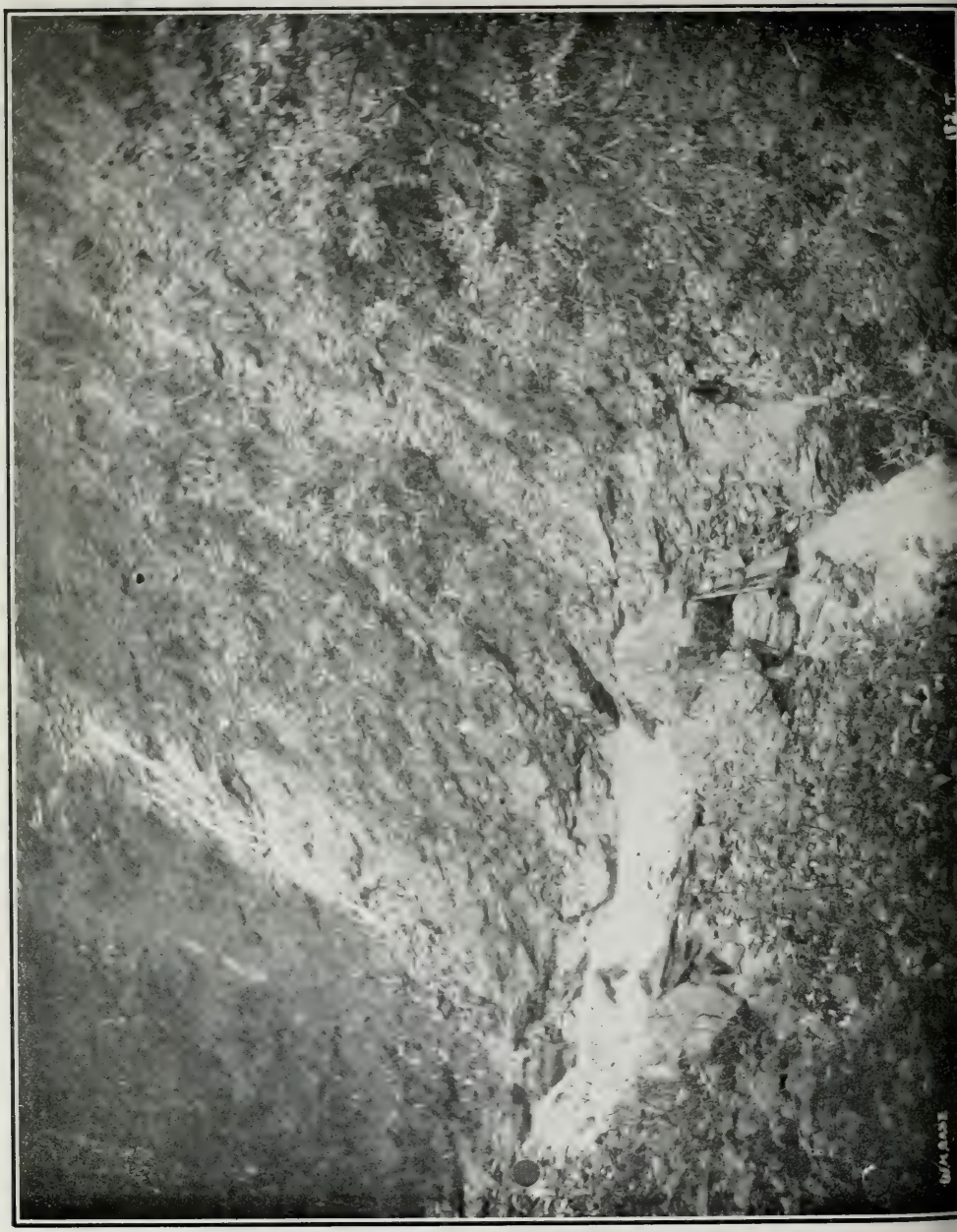
1686]



[1687]



Cascade Above Last Chance Basin, Gold Creek.
Showing Ebner Stamp Mill, Power House, and Waste Dump.



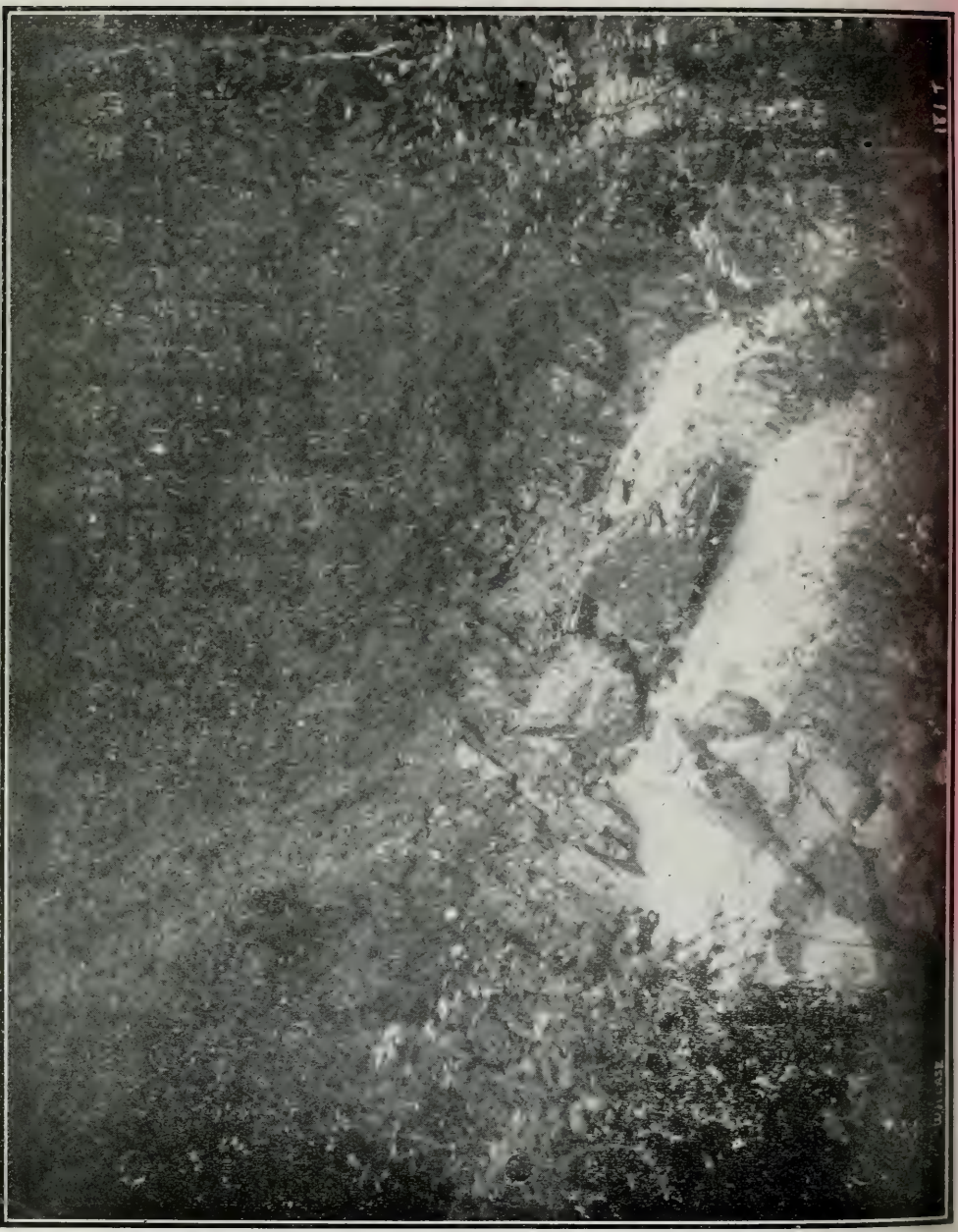
[1689]

[Defendant's Exhibit No. 15 for Identification—Admitted.]

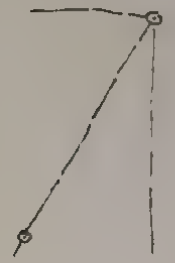


1690]

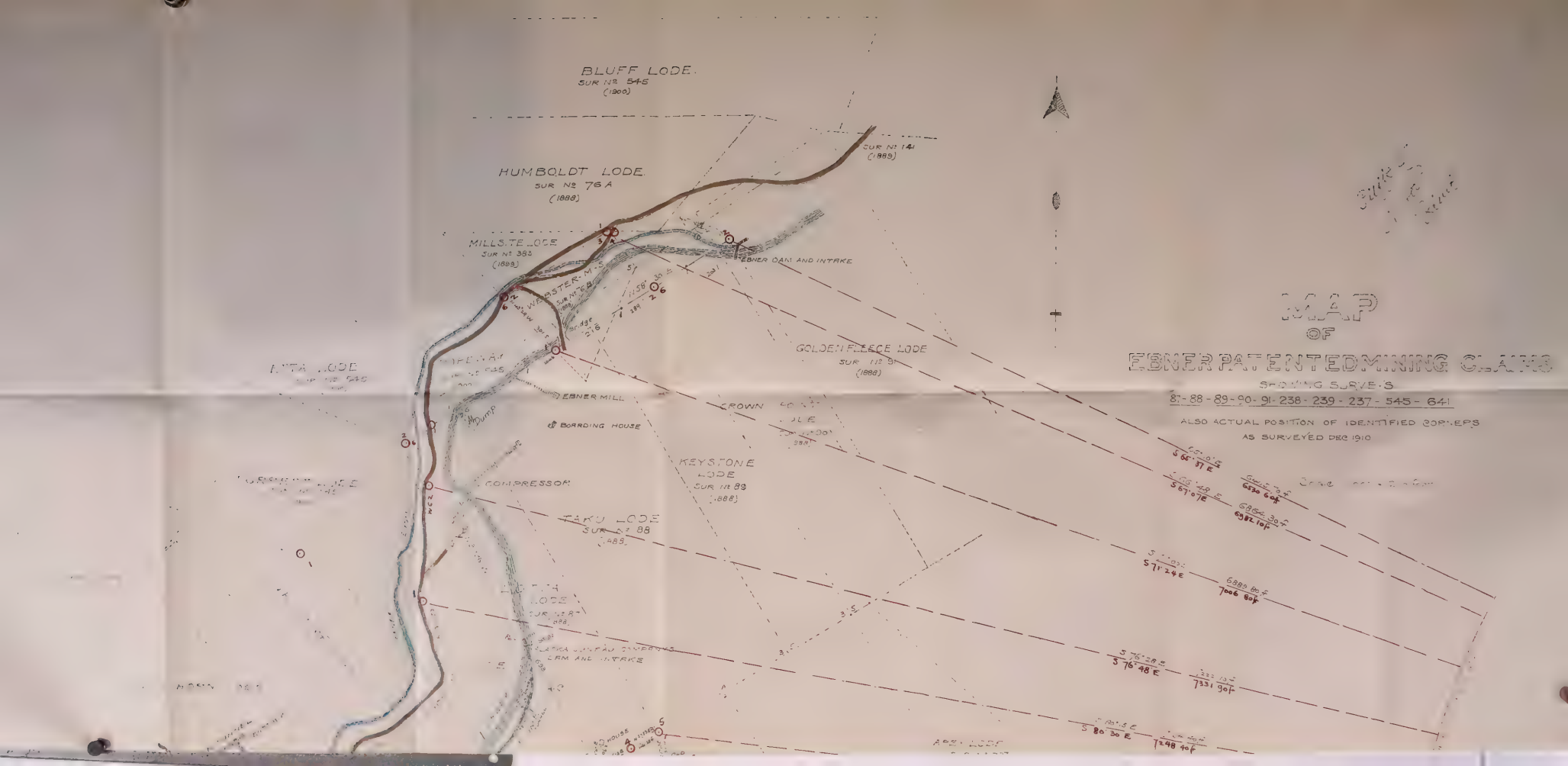
[Defendant's Exhibit 14 for Identification—Admitted.]

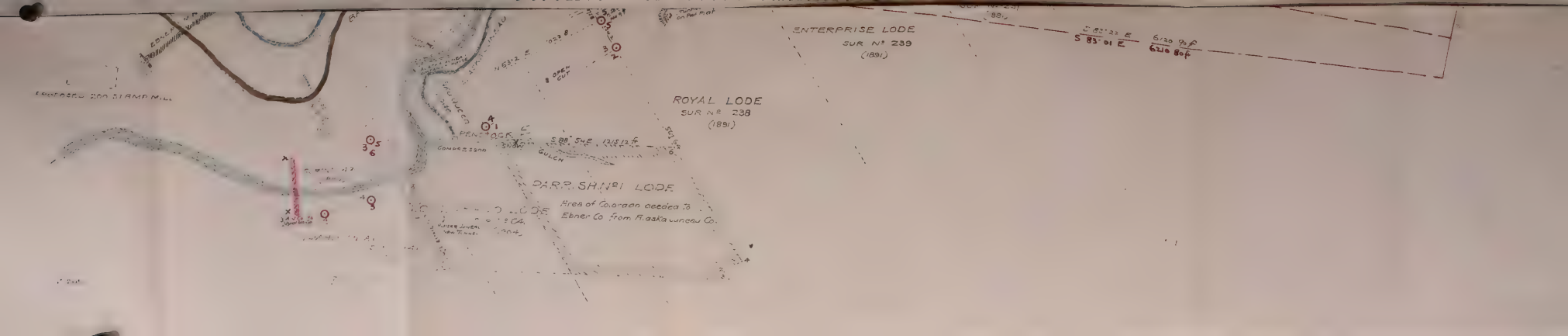


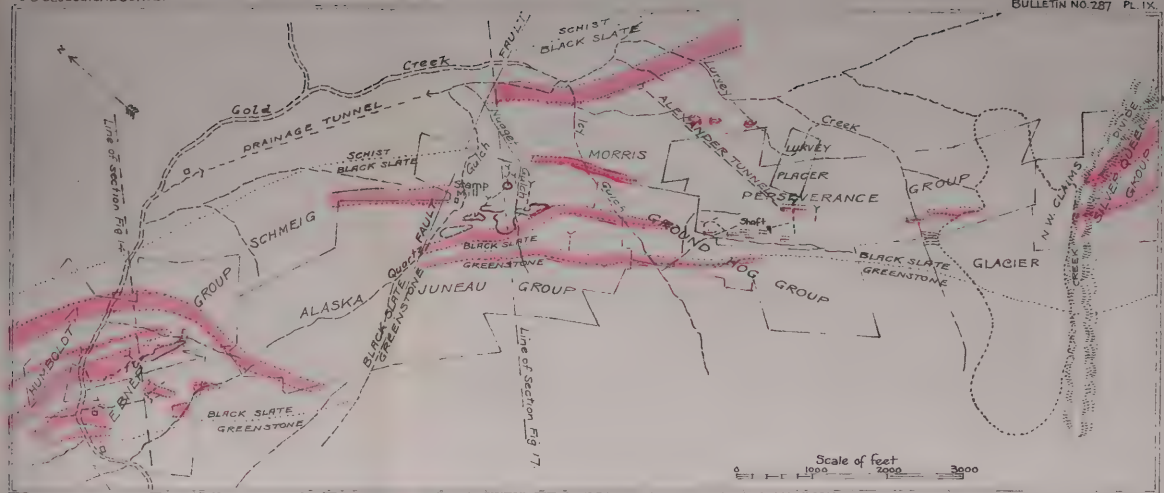
Defl Ex 26 (3)



(5)


BLUFF LODE
SUR Nº 545
(1900)
HUMBOLDT LODE
SUR Nº 76 A
(1888)
SUR Nº 141
(1889)
MILLSITE LODE
SUR Nº 383
(1889)
WEBSTER M.S.
SUR Nº 88
(1888)
EBNER DAM AND INTAKE
GOLDEN FLEECE LODE
SUR 112 B
(1888)
EBNER MILL
& BOARDING HOUSE
KEYSTONE
LODE
SUR 111 B
(1888)
COMPRESSOR
TAKU LODE
SUR Nº 88
(1889)
MAP
OF
EBNER PATENTED MINING CLAIMS
SHOWING SURVEYS
87-88-89-90-91-238-239-237-545-641
ALSO ACTUAL POSITION OF IDENTIFIED CORNERS
AS SURVEYED DEC 1910


ENTERPRISE LODE
SUR Nº 239
(1891)
S 83° 01 E
6720 80ft
ROYAL LODE
SUR Nº 238
(1891)
PENNOCK
GULCH
S 88° SW.
DARR SHIVEL LODE
Fires of Colorado deeded to
Ebner Co from Alaska Juneau Co.
ENTRANCE 200 ft AMP MILL



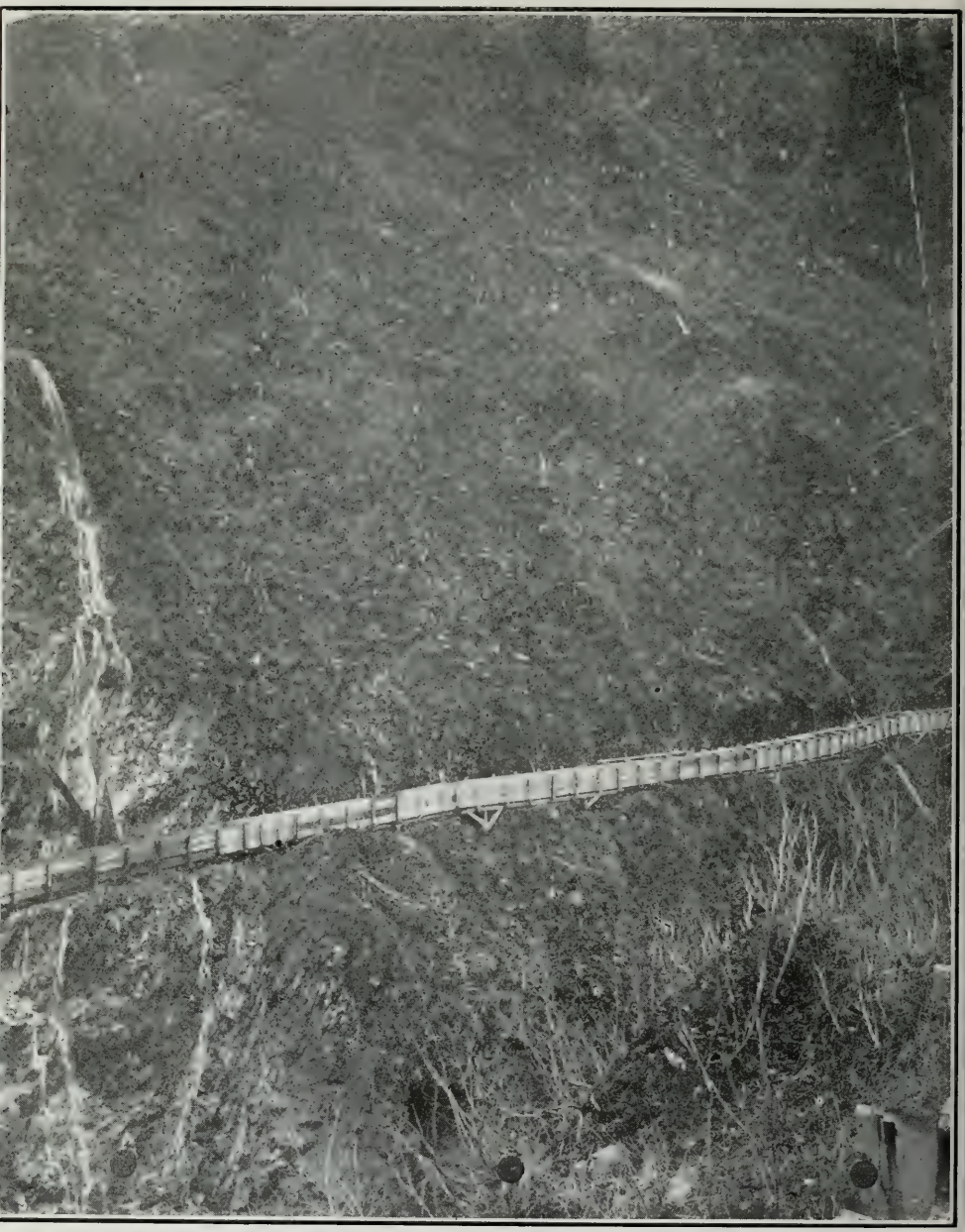
GEOLOGIC SKETCH MAP OF UPPER PART OF GOLD CREEK

JULIUS BIEN & CO. LITH. N.Y.

[Plaintiff's Exhibit "PP."]



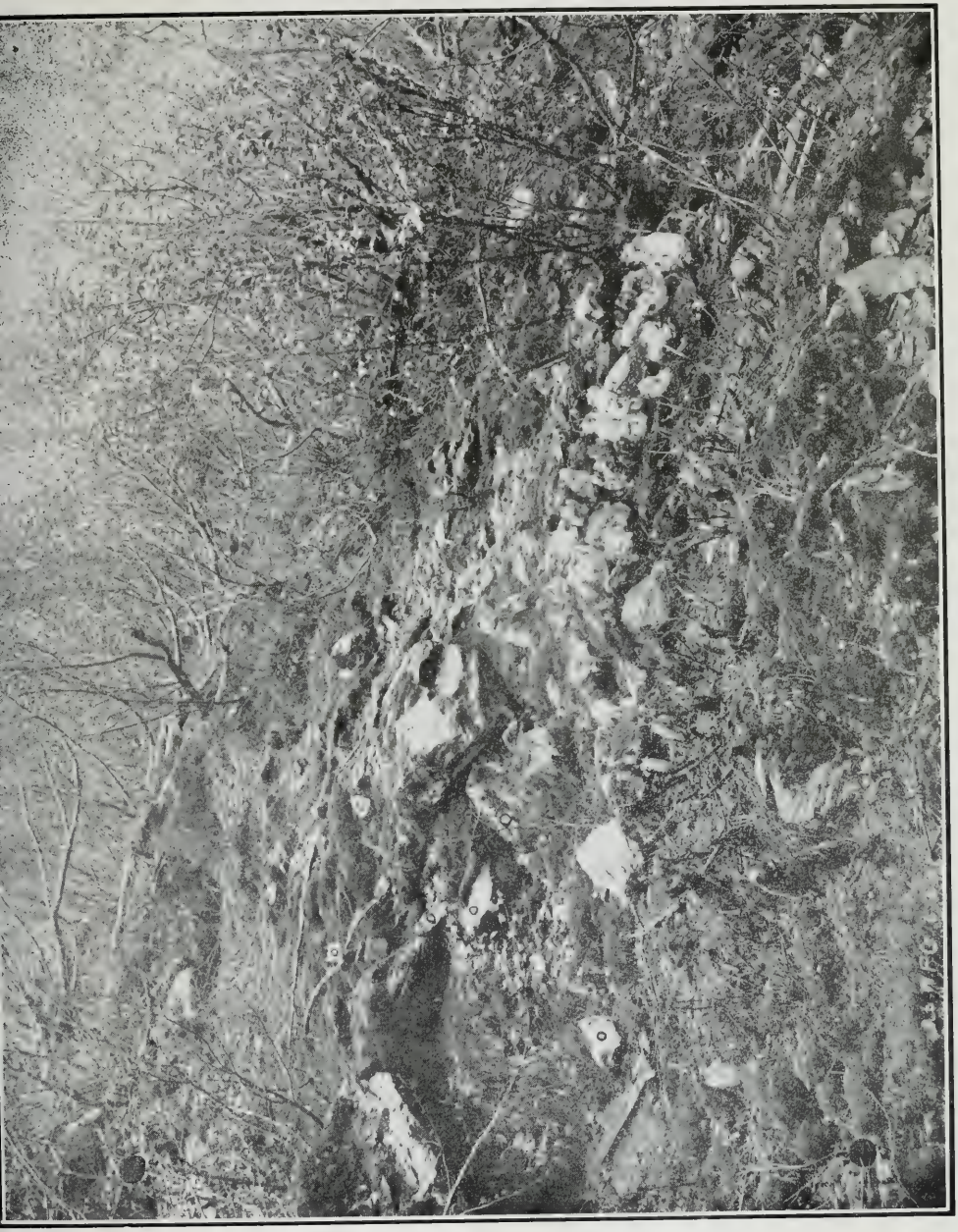
[Plaintiff's Exhibit "M" for Identification.]



Shows Tunnels—Upper and Lower.

[1696]

[Plaintiff's Exhibit "QQ."]



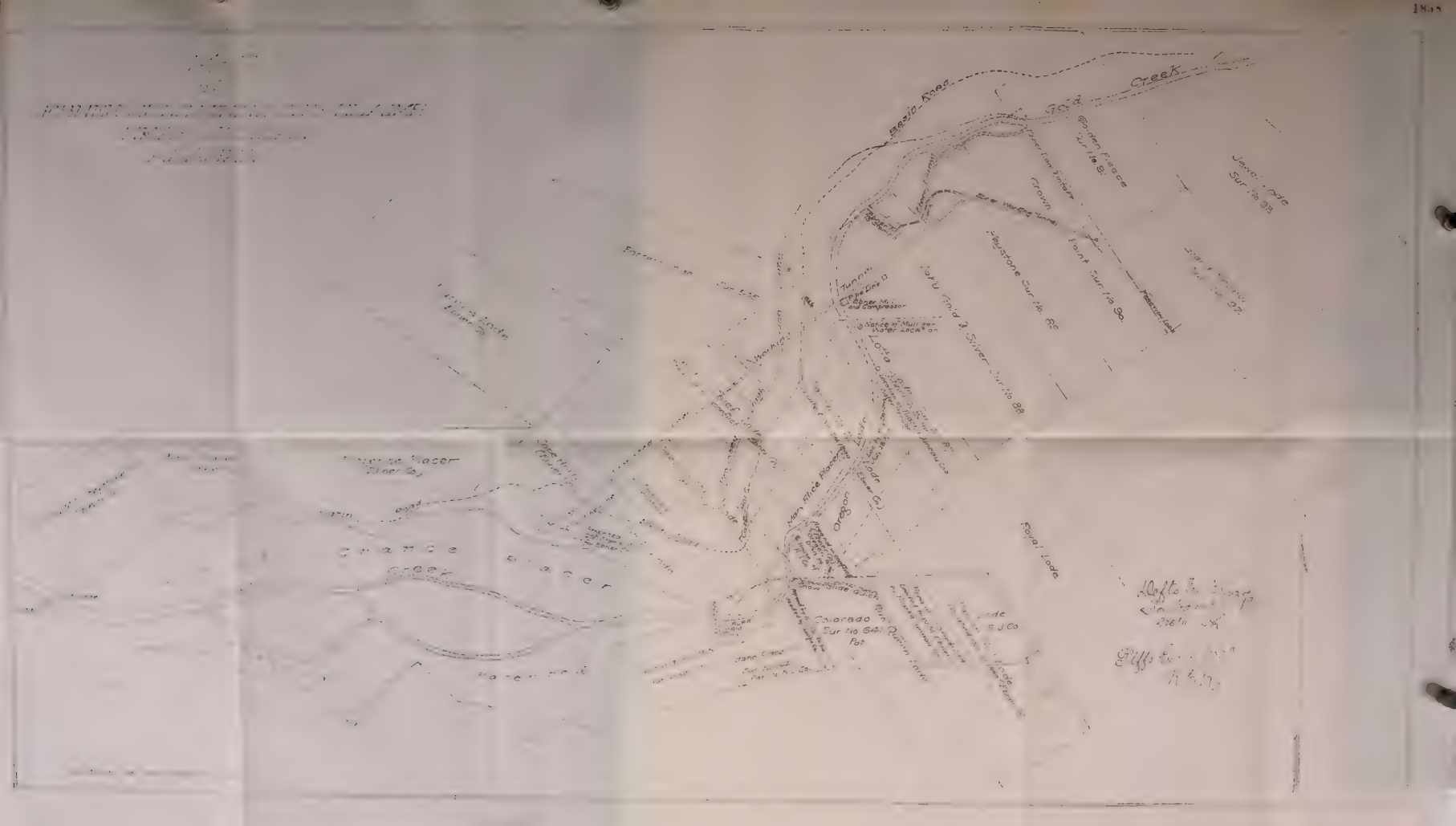
1697]



698]

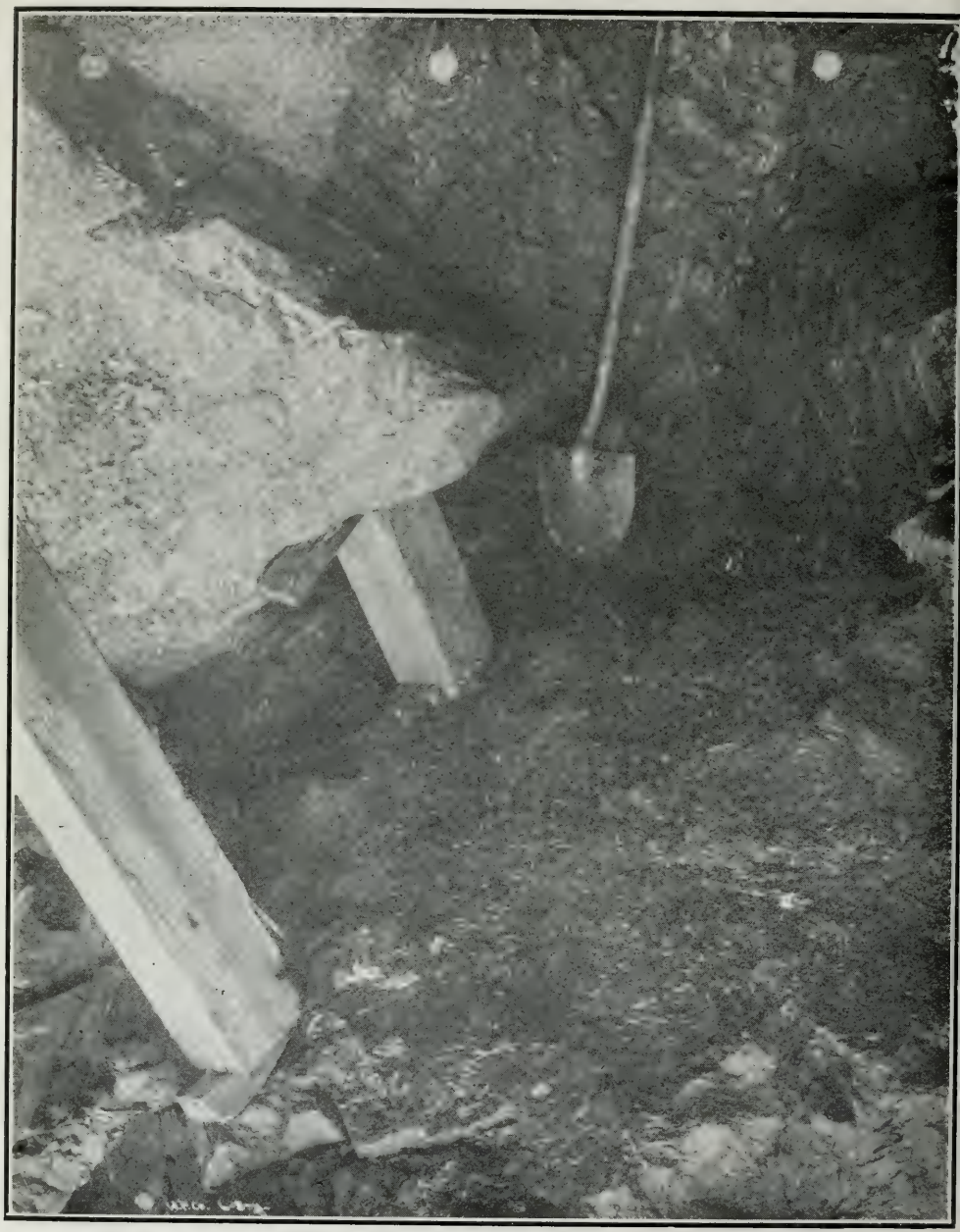


[1699]


Creek
Gold
Basin Road
Crown Fleece
Sur No 91
Crown Point
Sur No 90
Sur No 89
Sur No 88
Sur No 87
Sur No 86
Colorado
Sur No 641
Portion
Pat
Oregon
Lode
Placer
Creek



[1701]



[1702]



1703]

[Deed Dated March 10, 1909—Alaska-Juneau Gold Mining Company to Ebner Gold Mining Company.]

THIS INDENTURE, made this 10th day of March, in the year of our Lord One Thousand Nine Hundred and Nine, between the ALASKA JUNEAU GOLD MINING COMPANY, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and doing business in the District of Alaska, the party of the first part, and the EBNER GOLD MINING COMPANY, a corporation organized and existing under and by virtue of the laws of the District of Alaska, the party of the second part,

WITNESSETH

That, Whereas, by a certain Contract and Agreement made and entered into by and between the parties herein, of date 25th day of April, A. D. 1905, wherein and whereby the party of the first part herein agreed to convey all of that portion of the Colorado Lode Mining Claim in conflict with the Parish Lode Mining Claim (which conflict is hereinafter fully described) upon receiving United States patent to said Colorado Lode Mining Claim, to the party of the second part herein, in consideration of said party of the second part herein dismissing and withdrawing a certain adverse suit which it had filed against the application of the party of the first part herein for a patent to the Colorado Lode Mining Claim, and in which adverse, so filed as aforesaid, the said Ebner Gold Mining Company, the party of the second part herein, claimed all that portion or parcel of said Colorado Lode Mining Claim in con-

flict with the said Parish Lode Mining Claim, the description of which conflict is the property in this deed conveyed to the said Ebner Gold Mining Company;

And Whereas the party of the first part herein has now obtained a patent for said Colorado Lode Mining Claim, including within its exterior boundary lines the conflict herein mentioned [**1704**] with the said Parish Lode Mining Claim.

NOW THEREFORE for and in consideration of the premises and the sum of $1.00 to the party of the second part, receipt whereof is hereby acknowledged, the party of the first part hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, its successors and assigns:

All the following described real estate situate in the District of Alaska, to-wit:

Commencing at corner number 6 Colorado Lode, Survey No. 641, whence corner number 5 Royal Lode bears North 33° 45′ West, 567.64 feet distant; thence South 33° 43′ West, 522.36 feet along lines 6–1 Colorado Lode to corner number 1 Colorado Lode; thence South 56° 15′ West, 86.30 feet along lines 1–2 Colorado Lode to corner number 2; thence South 41° 15′ East, 34.96 feet along lines 2–3 Colorado Lode to corner number 3; thence South 84° West, 585.64 feet along lines 3–4 Colorado Lode to point of intersection with Southwest side line of Parish No. 1 Lode; thence along Southwest side line of Parish No. 1 Lode North 33° 45′ West, 600 feet to point of intersection with northwest side line of Colorado Lode; thence along northwest side line of Colorado Lode

lines 5–6, North 84° East, 678 feet to corner No. 6 Colorado Lode and place of beginning, containing an area of eight and six-hundredths (8.06) acres.

All of said above described property being in the Harris Mining District, District of Alaska; together with all and singular the mines, minerals, lodes and veins (except as hereinafter reserved) within the lines of said above described conflict and their dips and spurs, and all improvements,

RESERVING, HOWEVER, to the said party of the first part a right to drive, occupy and use a tunnel through the ground so in conflict for the purpose of reaching and developing the mining properties belonging to said party of the first part.

ALSO RESERVING to the said party of the first part all those underground parts of veins underlying the surface of the tract hereby conveyed, the tops or apexes of which are outside of said conveyed premises, and within the boundaries of lode mining claims now owned or possessed by said party of the first part. **[1705]**

IN WITNESS WHEREOF the said party of the first part hath hereunto caused its corporate name and seal to be affixed the

10th day of March, 1909.

ALASKA-JUNEAU GOLD MINING CO.

By F. N. BRADLEY,

President.

[Seal] Attest: JOSEPH H. MOOSER,

Secretary. **[1706]**

State of California,

City and County San Francisco,—ss.

This is to certify that on this 10th day of March,

1909, before me, the undersigned, a Notary Public in and for said City and County duly commissioned and sworn, that F. N. BRADLEY, President, and JOSEPH H. MOOSER, Secretary, of the within named Corporation who are personally known to me to be such President and Secretary, respectively, of said Corporation, personally appeared before me this day, and acknowledged the within and foregoing Warranty Deed to be their free and voluntary act and deed, and the free and voluntary act and deed of said Corporation.

Witness my hand and official seal this 10th day of March, A. D. 1909.

[Seal] JOHN R. TYRRELL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]:

District of Alaska,

Juneau,—ss.

The within instrument was filed for record at 3 o'clock P. M. March 20, 1909, and duly recorded in book 22 of Deeds on page 182 of the records of said District.

H. H. FOLSOM,

District Recorder. [1707]

[Resolution Authorizing President and Secretary of Alaska-Juneau Gold Mining Company to Execute Deed to Ebner Gold Mining Company.]

WHEREAS, by a certain Contract and Agreement made and entered into by and between the Alaska Juneau Gold Mining Company and the Ebner Gold Mining Company, dated the 25th day of April,

A. D. 1905, wherein and whereby the former Company agreed to convey all that certain portion of the Colorado Lode Mining Claim in conflict with the Parish Lode Mining Claim upon receiving United States patent to said Colorado Lode Mining Claim, to the Ebner Gold Mining Company, as set forth in said Contract and Agreement, and

WHEREAS the Alaska Juneau Gold Mining Company has now obtained a patent for said Colorado Lode Mining Claim, including within its exterior boundary lines the conflict mentioned with the said Parish Lode Mining Claim, and

WHEREAS the Ebner Gold Mining Company has requested the Alaska Juneau Gold Mining Company to comply with the terms of said Contract and Agreement of April 25, 1905,

NOW THEREFORE, be it

RESOLVED that the President and Secretary of this Company, the Alaska Juneau Gold Mining Company, be and they hereby are authorized, empowered and directed to execute, in the name of this Corporation and deliver to the said EBNER GOLD MINING COMPANY, the said Deed as read to this Board of Directors, conveying Eight and six-hundredths (8.06) acres comprised in said Colorado Lode Mining Claim, and as per the terms and conditions of the Contract and Agreement of April 25, 1905, aforesaid.

I, Joseph H. Mooser, Secretary of the Alaska Juneau Gold Mining Company, do hereby certify that the above is a true, [1708] correct and full copy of Preamble and Resolution duly and regularly passed and adopted at a Meeting of the Board of

Directors of said Corporation, held on the 10th day of March, 1909.

WITNESS My hand and the Seal of the said Alaska Juneau Gold Mining Company, this 11th day of March, 1909.

[Seal] JOSEPH H. MOOSER,
Secretary Alaska Juneau Gold Mining Company.

[Endorsed]: 182.
District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 3 o'clock P. M. March 20, 1909, and duly recorded in book 22 of Deeds on page 182 of the records of said District. H. H. FOLSOM,
District Recorder. [1709]

[Contract and Agreement Dated April 25, 1905, Between Alaska-Juneau Gold Mining Company and Ebner Gold Mining Company.]

THIS CONTRACT and AGREEMENT made *an* entered into this 25th day of April, 1905, by and between the ALASKA JUNEAU GOLD MINING CO., party of the first part, and the EBNER GOLD MINING CO., party of the second part.

WITNESSETH:

THAT WHEREAS, the party of the first part has applied for a United States patent to that certain lode mining claim in the Harris Mining District, District of Alaska, at or near Snow Slide Gulch on Gold Creek about two miles from Juneau, known and designated as the Colorado Lode Claim; and whereas, said Colorado Lode Claim is in conflict with a certain lode claim known as the Parrish Lode

Claim, claimed by the said party of the second part. And the said party of the second part has filed its adverse claim and brought its adverse suit for the ground so in conflict, now therefore, in compromise and settlement of said litigation, it is hereby understood and agreed that the said party of the second part shall dismiss its said adverse suit and withdraw said adverse claim; that the party of the first part shall proceed with and prosecute to patent said patent proceedings, and when it shall have obtained a United States patent to the said Colorado Lode Claim, it shall make, execute and deliver to the party of the second part a deed conveying to it all the ground in conflict between said claims, reserving, however, to the said party of the first part a right to drive, occupy and use a tunnel through the ground so in conflict, or any portion of the said Parrish Lode Claim for the purpose of reaching and developing the mining properties [1710] belonging to the said party of the first part.

IN TESTIMONY WHEREOF, the parties hereto have hereunto affixed their corporate names in duplicate this the year and day first above written.

ALASKA-JUNEAU GOLD MINING CO.

[Seal] By F. N. BRADLEY,
President.

By LOUIS H. MOOSER,
Asst. Secretary.

EBNER GOLD MINING CO.

By WM. M. EBNER,
President.

By B. M. BEHRENDS,
Secty.

[Endorsed]:

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 10:09 A. M., Nov. 20, 1905, and duly recorded in book 18 of Agreements, on page 577 of the records of said District.

H. H. FOLSOM,
District Recorder. [1711]

[Defendant's Exhibit No. 8.]

Ebner Gold Mng. Co. vs. Alaska-Juneau Gold Mng. Co.—835-A.

Defendant's Ex. 8, Being Page 99 of Ledger of Ebner Gold Mng. Co.

Parish Lode.

1901.					1905.		
Jan.	31.	Development	167	7.75	Jan. 5.	Development	300 168.55
July	30.	W. M. Ebner	188	16.25	Feb. 5.	"	303 200.
Sept.	30.	"	193	25.00	Oct. 22/06.	Balance	1511.55
Dec.	31.	"	199	79.75			
	31.	Operating	200	11.80			
1903.							
Jany.	5.	Wm. M. Ebner	223	28.00			
1905.							
Feb.	5.	B. M. B. B.	303	199.25			
		Mining	303	.75			
Apr.	5.	B. M. B. B.	310	13.50			
		"	310	10.			
Dec.	5.	Geo. Dull	347	25.00			
1905.							
Jany.	5.	B. M. B.	352	40.00			
1906.							
July	5.	W. M. Ebner	393	1.50			
Oct.	22.	Development	16	368.55			
"		Mining	16	1053.00			
				1880.10			1880.10
Oct.	22.	To Balance		1511.55			
Nov.	5.	Pay Roll	18	17.			
Dec.	5.	"	24	10.50			

[1712]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Certificate [of Stenographer to Transcript of Testimony, etc.].

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that the Honorable Edward E. Cushman, the Judge before whom the trial of the above-entitled cause was had, was, at the time of the trial of said cause, and is now, the regular presiding judge of the Third Judicial Division; that he, the said Honorable Edward E. Cushman, occupied the bench of the First Judicial Division in the Territory of Alaska during the trial of the said above-entitled cause in place of Honorable Thomas R. Lyons, the regular judge of said First Judicial Division; that I reported the trial and proceedings in the above-entitled cause and that the foregoing is a full, true and correct transcript of all of the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits on which the same was heard, excepting the rock that was offered in evidence.

Dated this 15th day of June, 1912.

I. HAMBURGER,

Filed in the District Court, Territory of Alaska, Third Division. Jun. 15, 1912. Ed M. Lakin, Clerk. By ————, Deputy. [1713]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Certificate and Order Settling Bill of Exceptions.

Now on this 15th day of June, 1912, and within the time allowed by this Court, the plaintiff herein presents to the Court this, his Bill of Exceptions herein, containing all the testimony and evidence introduced upon the trial of said cause, except certain exhibits of rock the originals of which have been ordered transmitted to the Court of Appeals, and prays that the same be allowed, filed and made a part of the record in this cause; and the Court being fully advised in the premises,

IT IS ORDERED that the foregoing Bill of Exceptions be, and the same is, hereby, allowed and settled, and the Clerk of the above-entitled Court ordered to file the same and the same is hereby made a part of the record in the foregoing entitled case.

Done in open court this 15th day of June, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 15, 1912. Ed M. Lakin, Clerk. By ————, Deputy. **[1714]**

[Endorsed]: No. 835–A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., a Corp., vs. Alaska-Juneau Gold Mining Co., a Corp. Bill of Exceptions. Filed Jun. 18, 1912. E. W. Pettit, Clerk. By ————, Deputy. **[1715]**

[Minute Entry Re Certificate and Order Settling Bill of Exceptions.]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

ORDER.

The Court having signed an order herein on May 23, 1912, and the same having been entered herein, which said order was made sustaining the objections filed by the above-named defendant to an offered and tendered Bill of Exceptions herein by the plaintiff,

on the ground and for the reason that said offered Bill of Exceptions did not contain all of the testimony and evidence in the above-entitled cause, and now on this 25th day of May, 1912, in open court, the attorneys for plaintiff being present, also the attorneys for the above-named defendant, and the attorneys for plaintiff announced that they had filed plaintiff's assignment of errors and had ordered from the official court stenographer, who reported the above-entitled cause, a full transcript of all the testimony and evidence herein and had served upon the attorneys for the defendant plaintiff's assignment of error as well as plaintiff's Petition for Writ of Error and the Writ of Error and Citation on Writ of Error, copy of a proposed Bond on Writ of Error and a copy of a proposed Certificate of the Court and Order Settling and Allowing the Bill of Exceptions herein, and the Court having allowed said writ of error and said petition and fixed the bond on said writ of error and signed the citation, the form of said undertaking or bond was submitted to the Court and said certificate and order [1716] settling and allowing the bill of exceptions and having been served upon the attorneys for the defendant and said form of bond or undertaking approved by the Court without any objection on the part of the attorneys for the defendant: It was then agreed in open court by and between the attorneys for plaintiff and attorneys for the defendant that upon the official court reporter having completed his transcript of all the testimony and evidence herein and presenting the same to the Court, that a certificate and order

allowing and settling said bill of exceptions could be signed by the Court without the presence of the attorneys representing the respective parties herein, and accordingly the attorneys for plaintiff submitted and lodged with the Court a certificate and order, after the same had been served upon the attorneys for the defendant, which said certificate was and is as follows:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Certificate and Order Settling Bill of Exceptions.

Now on this —— day of ————, 1912, and within the time allowed by this Court, the plaintiff herein presents to the Court this, its Bill of Exceptions herein, containing all the testimony and evidence introduced upon the trial of said cause and prays that the same be allowed, filed and made a part of the record in this cause; and the Court being fully advised in the premises,

IT IS ORDERED that the foregoing Bill of Exceptions be, and the same is, hereby, allowed and settled, and the Clerk of the above-entitled Court ordered to file the same and the same is hereby made

a part of the record in the foregoing entitled case.

DONE in open court this —— day of ————, A. D. 1912.

————————,

Judge." [1717]

And the Court thereupon agreed upon the official court stenographer presenting to the Court a full, true and correct copy of all the testimony in evidence taken upon the trial of said cause, that the above certificate would be signed and attached thereto.

Done in open court this 15th day of June, 1912.

EDWARD E. CUSHMAN,

Judge.

Received copy of within June, 10th, 1912.

HELLENTHAL & HELLENTHAL.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 15, 1912. Ed. M. Lakin, Clerk. By ————, Deputy. Filed Jun. 18, 1912. E. W. Pettit, Clerk. By ————, Deputy. [1718]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Motion [to Make Certain Papers and Exhibits Part of Record and Bill of Exceptions].

Comes now the above-named plaintiff, by its attorneys, Winn & Burton, and moves the Court to make part of the record and Bill of Exceptions in the above-entitled cause, the following papers and exhibits offered in evidence at the trial of said above-entitled cause, to wit, viz.:

Plaintiff's Exhibits "N," "M," "QQ," "PP"; also Location Notice Parrish No. 2, Deed of said Parrish No. 2 from Wm. M. Ebner to Ebner Gold Mining Company; Contract, Deed and Resolution in re conflict Parrish No. 1 with Colorado Lode; Answer and Oral Opinion in Cause No. 803–A; also copy of page 99 of the Ledger of the Ebner Gold Mining Company; all of which foregoing papers and exhibits were offered and admitted in evidence upon the trial of the above-entitled cause;

Also the following papers, viz.: Motion for New Trial; Findings of Fact and Conclusions of Law offered by the Plaintiff; Objection to Proposed Findings of Fact and Conclusions of Law offered and tendered by the Defendant; Objections and Exceptions to Findings and Conclusions made by the Court and Exceptions to refusal of Court to make Findings and Conclusions offered by the Plaintiff and to Modification of same by the Court.

Also Defendant's Exhibits, Nos. 3 (plat), 68, 70, 69, 21, 9 and 66.

WINN and BURTON,
Attorneys for Plaintiff.

Due service of a copy of the within Motion is admitted this 11 day of May, 1912.

HELLENTHAL & HELLENTHAL,
Attorney for Defendants. [1719]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 23, 1912. Ed M. Lakin, Clerk. By ————, Deputy. Filed Jun. 3, 1912. E. W. Pettit, Clerk. By ————, Deputy. [1720]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the above-entitled Court:

Please prepare Transcript in the above-entitled cause on Writ of Error, consisting of the following papers, viz.:

1. Amended Complaint, filed May 8, 1911.
2. Answer to Amended Complaint, filed May 12, 1911.
3. Motion to Strike Certain Portions of Answer to Amended Complaint, filed May 15, 1911.

4. Ruling of Court on above motion; (123), filed May 15, 1911.
5. Demurrer of Plaintiff to Amended Complaint, filed May 16, 1911.
6. Order Overruling Above Demurrer, filed May 16, 1911.
7. Reply to Answer to Amended Complaint (not to include that portion of Reply stricken by drawing lines thru such stricken portions), filed May 19, 1911.
8. Order Granting Motion to Amend Complaint by Interlineation, filed May 3, 1911.
9. Order Allowing Complaint as Amended.
10. Order Showing Defendant Waives Defense of Another Action Pending, filed May 16, 1911.
11. Order Overruling Plaintiff's Demurrer to Defendant's Further Answer, filed May 16, 1911.
12. Order Dismissing Plaintiff's Third Cause of Action in Amended Complaint, filed May 24, 1911.
13. Order Showing Waiver of Trial by Jury, filed May 15, 1911.
14. Motion of Defendant to Amend Answer by Pleading Forfeiture, filed June 9, 1911. [1721]
15. Order of Court Allowing Above Amendment, filed June 9, 1911.
16. Order of Court Denying Defendant's Proposed Tendered Findings, filed July 5, 1911, and Aug. 21, 1911.
17. Findings of Fact and Conclusions of Law Made by the Court, filed Aug. 21, 1911.

18. ~~Written Objections and Exceptions to Findings of Fact and Conclusions of Law Made by the Court, and the ruling thereon. Filed Oct. 17, 1911.~~
19. Judgment and Decree, filed July 5, 1911, and Aug. 21, 1911.
20. Order Transferring Files and Granting Time to File Bill of Exceptions (Jour. "H," p. 188), filed June 12, 1911.
21. Order Retransferring Papers from Clerk of District Court, Fairbanks, to Clerk of District Court at Juneau, filed Juneau, Aug. 21, 1911.
22. Order (p. 61, Jour.) Granting Additional Time File Bill of Exceptions, filed Oct. 18, 1911.
23. Order (p. 145, Jour.) Extending Time File Bill of Exceptions, filed Feb. 10, 1912.
24. Order (p. 277, Jour.) Extending Time File Bill of Exceptions, filed May 1, 1912.
25. Last Order Extending Time File Bill of Exceptions, filed May 28, 1912.
26. Motion and Request of Plaintiff to Forward Certain Exhibits.
27. Order Made May 23, 1912, by Judge Cushman Refusing to Sign Bill of Exceptions Presented.
28. Affidavit of John R. Winn that the Value of Property in Controversy is Worth Over $500.
29. Defendant's Objections to Signing and Certifying Bill of Exceptions.
30. Order of Court Making Certain Exhibits Part of the Record and Directing Original Exhib-

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31. Assignment of Errors.
32. Petition for Writ of Error and Asking for Order Fixing Amount of Bond, and the Order of Court Attached Thereto.
33. Bond on Writ of Error.
34. Writ of Error and Allowing of Same by Court.
35. Citation on Writ of Error.
36. Order Extending Time to Make Return to Clerk of Circuit Court Under Citation Signed by Judge Cushman at Valdez.
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WINN and BURTON,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 20, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [1723]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff and Plaintiff in Error,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant and Defendant in Error.

Certificate [of Clerk U. S. District Court to Record, etc.].

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby CERTIFY that the foregoing and hereto attached seventeen hundred and twenty-three pages of typewritten and other matter, numbered from one to seventeen hundred and twenty-three, both inclusive, together with one certain canvass sack containing exhibits of rock, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the plaintiff and plaintiff in error, on file in my office and made a part hereof, in Cause No. 835–A of the above-entitled court, wherein the Ebner Gold Mining Company, a corporation, is plaintiff and plaintiff in error and the Alaska-Juneau Gold Mining Company, a corporation, is defendant and defendant in error. I do FURTHER CERTIFY that the said record is by virtue of writ of error and citation issued in this

cause, and the return thereof in accordance therewith.

I FURTHER CERTIFY that this transcript was prepared by me in my office, and that the costs of preparation, examination and certificate, amounting to seven hundred twenty-eight and 10/100 ($728.10) dollars, have been paid to me by John R. Winn, Esq., Attorney for Plaintiff and Plaintiff in Error.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 22d day of June, 1912.

[Seal] E. W. PETTIT,
Clerk. [1724]

[Endorsed]: No. 2155. United States Circuit Court of Appeals for the Ninth Circuit. Ebner Gold Mining Company, a Corporation, Plaintiff in Error, vs. Alaska-Juneau Gold Mining Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed July 1, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2155

United States

Circuit Court of Appeals

For the Ninth Circuit.

EBNER GOLD MINING COMPANY (a Corporation),
Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

In the District Court for the District of Alaska, Division Number One, at Juneau.

835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff and Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant and Defendant in Error.

Supplemental Record on Appeal.

WINN & BURTON, Attorneys for Plaintiff and Plaintiff in Error.

HELLENTHAL & HELLENTHAL, Attorneys for Defendant and Defendant in Error.

Addresses: Juneau, Alaska.

In the Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

THE EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant in Error.

In the District Court for the District of Alaska, Division No. One.

THE EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Stipulation [Concerning Certain Omissions from Testimony and Bill of Exceptions, and Concerning Supplemental Transcript of Record].

It is hereby stipulated by and between counsel for the respective parties as follows:

That whereas, this cause was tried in the District Court for Alaska at Juneau before the Honorable E. E. Cushman, who was the Judge assigned to the Third Division for the District of Alaska and was temporarily holding court in the First Division at Juneau, at the time of the trial of the above-entitled cause; and that whereas the testimony upon the trial was taken in shorthand by I. Hamberger, who transcribed the same after the return of Judge Cushman to the Third Division where he was accompanied by the said I. Hamberger; that in transcribing his notes of the testimony the said I. Hamberger inadvertently omitted certain proceedings had upon the trial, which are hereinafter referred to, and certified to the Court that the transcript as prepared by him contained all the evidence and proceedings had upon the trial, while as has been stated, certain proceed-

ings were inadvertently omitted; that the said transcript incorporated in the proposed bill of exceptions was submitted to the Honorable E. E. Cushman while at Valdez and presented to him for settlement by the said Hamberger at the request of counsel for plaintiff in error, who [1*] believed that the proceedings hereinafter referred to, together with all the other evidence in the case, had been incorporated therein; that counsel for both sides reside at Juneau, Alaska, several hundred miles distant from said Valdez, Alaska, and on that account the Honorable E. E. Cushman, relying upon the certificate of the said I. Hamberger that the said proposed bill of exceptions contained all the evidence and proceedings had upon the trial, settled and allowed said bill of exceptions and certified that the same contained all the evidence and proceedings had; that the record in this cause is very voluminous so that the Court, as well as counsel, were obliged to rely upon the certificate of the reporter to the effect that the proposed bill of exceptions did contain all the evidence and proceedings:

NOW, THEREFORE, it is stipulated by and between counsel for the respective parties that in addition to the evidence and proceedings incorporated in the bill of exceptions, the proceedings hereinafter referred to were had upon the trial of the above-entitled cause; that at the close of the evidence of F. J. Wettrick, in rebuttal, the following proceedings were had in open court, as evidenced by the tran-

*Page-number appearing at foot of page of original certified Record.

script certified to by I. Hamberger, hereto attached and marked Exhibit "A."

EXHIBIT "A."

"By Judge WINN.—We rest with the understanding that if the Court wants to go up and see the property I will join in the request, but the probabilities are you would not see some things as they have been testified to because the rain, etc., make changes very suddenly up there.

By the COURT.—I think the counsel had better agree—if both sides are requesting it—that one man from each side accompany the Court so as to point out and direct attention to anything.

Mr. SHACKLEFORD.—We will have Mr. Stewart go up with you.

Judge WINN.—Mr. Wettrick has not been up there on any of these last trips but Mr. Ebner can go with Mr. Wettrick in advance and point out to him any of these matters that have come up and then he will be in position to state to the Court what we have contended.

By the COURT.—It being understood that no further disturbance of the conditions as far as this pit is concerned will be made by either side. [2]

Judge WINN.—Yes, sir, it is understood he will simply point out to Mr. Wettrick generally some of the matters that have been testified to."

It is further agreed that after the above referred to proceedings were had in open court and pursuant thereto the presiding Judge, the Honorable E. E.

Cushman, did view the premises in dispute accompanied by B. F. Stewart and F. J. Wettrick, who represented the respective parties and pointed out to the Court the matters and things referred to in the testimony by the various witnesses.

It is further stipulated and agreed that this stipulation shall be submitted to the Circuit Court of Appeals as part of the record in the cause and shall be deemed and considered as a part of the record as fully as if made so by order of the Court, and that the matters and things herein set forth shall be regarded in the same light as though actually incorporated in the bill of exceptions; and further, that this stipulation shall be printed by the Clerk of the Circuit Court of Appeals as part of the record in the cause above referred to.

This stipulation is entered into for the reason that the Honorable E. E. Cushman no longer occupies the bench in Alaska, and for the further reason that the Honorable T. R. Lyons, Judge of the First Division in the District of Alaska, is now in the Second Division, so that there is not now any Judge in the First Division for the District of Alaska, so that the proceedings above referred to could be certified to by any Judge as part of the record in the cause or made part of the record by a supplemental bill of

exceptions signed by any Judge.

Dated this 15th day of August, 1912.

JNO. R. WINN,
WINN & BURTON,

Attorneys for the Plaintiff in Error, Plaintiff in the Court Below.

J. A. HELLENTHAL,
HELLENTHAL & HELLENTHAL,

Attorneys for the Defendant in Error, Defendant in the Court Below. [3]

EXHIBIT "A."

At the close of the evidence of F. J. Wettrick, in Rebuttal:

By Judge WINN.—We rest with the understanding that if the Court wants to go up and see the property I will join in the request, but the probabilities are you would not see some things as they have been testified to because the rain, etc., make changes very suddenly up there.

By the COURT.—I think the counsel had better agree—if both sides are requesting it—that one man from each side accompany the Court so as to point out and direct attention to anything.

Mr. SHACKLEFORD.—We will have Mr. Stewart go up with you.

Judge WINN.—Mr. Wettrick has not been up there on any of these last trips but Mr. Ebner can go with Mr. Wettrick in advance and point out to him any of these matters that have come up and then he will be in position to state to the Court what we have contended.

By the COURT.—It being understood that no fur-

ther disturbance of the conditions as far as this pit is concerned will be made by either side.

Judge WINN.—Yes, sir, it is understood he will simply point out to Mr. Wettrick generally some of the matters that have been testified to.

I do hereby certify that the above is part of the record in the case of the Ebner Gold Mining Co. vs. Alaska-Juneau Gold Mining Co., No. 835–A, of the District Court for the First Division of Alaska; that if the same does not appear in the original Bill of Exceptions and Transcript of the evidence, its omission was an oversight on my part. I have no copy of the transcript before me, but have been advised that it cannot be found in the record as printed.

Dated Valdez, Alaska, August 5, 1912.

(Signed) I. HAMBERGER. [4]

[Endorsed]: In the Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco. The Ebner Gold Mining Company, a Corporation, Plaintiff in Error, vs. The Alaska-Juneau Gold Mining Company, a Corporation, Defendant in Error. In the District Court for the District of Alaska, Division No. One. The Ebner Gold Mining Company, a Corporation, Plaintiff, vs. The Alaska-Juneau Gold Mining Company, a Corporation, Defendant. Stipulation.

Filed Aug. 16, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [5]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2155.

EBNER GOLD MINING COMPANY,
Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant in Error.

Stipulation [Continuing Cause to December, 1912, Session, etc.].

WHEREAS, negotiations are pending looking toward a settlement of the above-entitled cause;

IT IS HEREBY STIPULATED AND AGREED by and between counsel representing the above-named plaintiff in error and the above-named defendant in error, respectively, that the above-entitled cause be continued to the December Session of the above-entitled court, 1912;

AND IT IS FURTHER STIPULATED AND AGREED, that the printing of the Record in said above-entitled cause need not be commenced until the 15th day of October, 1912.

Dated at Juneau, Alaska, August 15th, 1912.

(Signed) JNO. R. WINN,
WINN & BURTON,
Attorneys for Plaintiff in Error.

(Signed) J. A. HELLENTHAL,
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court for the Ninth Circuit. No. 2155. Ebner Gold Mining Co., Plaintiff in Error, vs. Alaska-Juneau Gold Mining Co., Defendant in Error. Stipulation Filed Aug. 16, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [6]

In the District Court for the District of Alaska, Division No. One.

THE EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Praecipe [for Supplemental Transcript of Record].

To the Clerk of the District Court for the District of Alaska, Division No. 1:

You are hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, as part of the record in this cause, a stipulation filed on August 15, 1912, relating to evidence and proceedings omitted from the bill of exceptions by inadvertence. Also stipulation continuing cause and extending time to print Record.

WINN & BURTON,
Attorneys for the Plaintiff. [7]

[Endorsed]: Original. No. ———. In the District Court for the District of Alaska, Division No. 1.

The Ebner Gold Mining Company, a Corporation, Plaintiff, vs. The Alaska-Juneau Gold Mining Company, a Corporation, Defendant. Praecipe. Filed Aug. 16, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [8]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 835–A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff and Plaintiff in Error,

vs.

ALASKA–JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant and Defendant in Error.

Certificate [of Clerk U. S. District Court to Supplemental Transcript of Record, etc.].

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereunto annexed eight pages of typewritten and written matter, numbered from 1 to 8 both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the plaintiff and plaintiff in error, on file in my office and made a part hereof, in Cause No. 835–A of the above-entitled Court, wherein Ebner Gold Mining Company, a corporation, is plaintiff and plaintiff in error, and the Alaska-Juneau Gold Mining Company, a corporation, is defendant and defendant in error.

I FURTHER CERTIFY that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to three and ninety-five one-hundredths dollars ($3.95), has been paid to me by Newark L. Burton, Esquire, of counsel for plaintiff and plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court this 16th day of August, A. D. 1912.

[Seal] E. W. PETTIT,
Clerk.

[Endorsed]: No. 2155. United States Circuit Court of Appeals for the Ninth Circuit. Ebner Gold Mining Company, a Corporation, Plaintiff in Error, vs. Alaska-Juneau Gold Mining Company, a Corporation, Defendant in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed August 26, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

EBNER GOLD MINING COMPANY,
(a corporation) Plaintiff in Error

vs.

ALASKA-JUNEAU MINING COMPANY,
(a corporation) Defendant in Error

No. 2155

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Brief of Plaintiff in Error

JNO. R. WINN and
N. L. BURTON,
Attorneys for Appellant in Error

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STATEMENT OF CASE

This action was brought in the District Court for the District of Alaska, Division No. 1, for the purpose of ejecting the defendant in error from three specific lode mining claims, and the amended complaint in this respect sets up three causes of action.

The first cause of action contains the ordinary allegations of a complaint in ejectment, stating that both the plaintiff in error and the defendant in error are corporations, etc., and that the plaintiff in error was, at the time of the commencement of the action, and had been for several years prior thereto, seized in fee, possessed and entitled to possession of a certain patented lode mining claim known as the Lotta lode, situated in Harris Mining District, District of Alaska; that while plaintiff in error was so seized, the defendant in error, sometime in August, 1910, and before the commencement of the action, without right or title, entered into the wrongful possession of part of the Lotta lode claim and ousted and ejected the plaintiff in error therefrom and wrongfully withheld the possession thereof, and that the defendant in error was engaged in building a dam and constructing a flume line upon, across and over said Lotta lode claim.

The second cause of action is predicated on plaintiff in error being seized, possessed, entitled to the possession and the owner by discovery, location, staking and marking of the boundaries, recording by its grantors and doing and performing of the annual assessment work on the Parish No. 2 lode mining claim and the ouster of plaintiff in error therefrom by the defendant in error in entering thereon and the building and constructing over and across the same a dam and flume line and unlawfully and wrongfully withholding the possession thereof.

The third cause of action was at the request of the plaintiff in error dismissed without prejudice during the course of the trial of the case. (P. R. 79.)

The defendant in error, by its answer, denies all of the material allegations of the amended complaint, except that the defendant in error is a corporation; and the defendant in error further claims that one J. P. Corbus, in the month of October, 1899, located what is known as the Oregon claim and that one R. G. Datson, on July 20, 1910, made a mineral location of virtually the same ground contained in the location made by Corbus, and on the 8th day of October, 1910, one W. R. Lindsay, made a location of a certain vein known as the Canyon vein or lode and that all the said parties thereafter conveyed said locations to the defendant in error. Defendant in error further claims that the dam and flume line complained of in the amended complaint were being constructed, or were con-

structed, upon the said Oregon and Canyon lode mining claims, which said claims conflict with the Lotta patented claim and the Parish No. 2 claim, described in the amended complaint.

The defense that there was another action pending wherein the same subject matter was in dispute was waived or withdrawn (P. R. p. 77). And the defendant in error also claims in its answer that it is the owner of another mining claim termed the Colorado patented mining claim, lying contiguous or adjacent to the Lotta or Parish No. 2, or what defendant in error terms the Oregon and Canyon lode claims. However, so far as this Colorado claim is concerned, it does not, in our judgment, in any wise affect this case as it is before the appellate court. The defendant in error proceeds to further answer the second cause of action set out in the amended complaint, which said cause of action concerns the title to the Parish No. 2 unpatented lode claim, substantially claiming that it has been engaged in the mining business in Alaska for some years and is the owner of a group of mining claims consisting of 31 patented and several unpatented claims, all situate in Silver Bow Basin, Alaska, contiguous or adjacent to the mining claims of the plaintiff in error set out and described in the amended complaint; and that it had for several years been engaged in extracting gold from these mining claims, erecting mills, constructing tunnels, etc., for the developing and mining of said property, and that it still contemplated the

further development and opening up of said mining claims on an enlarged scale and building a 200-stamp mill on the shore of Gastineau Channel, near Juneau, Alaska, which is something over a mile from its Colorado mining claim, and that it proposed to build a tramway from its Colorado mining claim to its mill and that its tramway would connect with a tunnel to be driven commencing on the Colorado claim and running through its various mining claims, and that it was seeking to take the water from Gold Creek from its dam, which is partly constructed upon the Lotta and Parish No. 2 lode mining claims, being the claims in dispute, and convey by a flume, pipe line, etc., to its mill to be erected on Gastineau Channel, to be there applied to generate power, etc., for the running of the mill; and looking towards the appropriation of said water, had caused one L. D. Mulligan and R. A. Kinzie, the latter being the agent and general superintendent of the defendant in error, to post certain water location notices, one of which said water location notices was posted on the Lotta patented lode mining claim and the other on that claim or close to the common side line of the Lotta and the Parish No. 2 claim.

These statements or allegations in the answer of the defendant in error appear to be set up as a defense or excuse for entering upon the Lotta and Parish No. 2 claims. The defendant in error then proceeds to set up some minutes of a meeting of miners in the Harris Mining District held in 1882 with reference to the appropriation of water. (P. R. pp 40-

41) And further claiming that the work that it was doing in no wise damaged the premises upon which the dam was built or the flume crossed, and claiming that said structures in no wise interfered with the use of the ground upon which the same was constructed or crossed for mining purposes. All of these excuses or pretended justification for entering upon the Lotta patented or Parish No. 2 unpatented claims are embraced in what the defendant in error terms its further answer to the second cause of action, that is, its answer to plaintiff in error's second cause of action, which concerns the title to Parish No. 2 mining claim, and commences near the bottom of page 28 of the record and continues to about the middle of page 45 of the record.

A motion was served and filed by the plaintiff in error on May 15, 1911, to strike each and all of the allegations, paragraphs and matters contained in said further answer to the second cause of action stated in the said amended complaint, for the reason and on the ground that each and all of the matters set up in each and all of the paragraphs of said further answer, and facts contained therein, were irrelevant and immaterial and that said allegations and facts set forth in said paragraphs of the said further answer to said second cause of action in the amended complaint constituted no defense to the matters complained of by the plaintiff in error. The motion in question is found on pages 45 to 48 inclusive of the record, and the court's order over-ruling and deny-

ing the motion is found at pages 48 and 49 of the record.

The plaintiff in error then served and filed a demurrer to the said further answer to the second cause of action stated in the amended complaint on the ground and for the reason that the matters and facts therein alleged and contained did not state a defense to the matters and facts set forth in the said second cause of action of said amended complaint, which said demurrer was over-ruled by the court. (P. R. pp. 49 to 51 inclusive.)

Plaintiff in error duly excepted to the ruling of the court in denying the motion and over-ruling the demurrer.

The plaintiff in error being thus forced to reply to these several matters set up by the defendant in error, claims that if J. P. Corbus ever undertook to make a location of what is termed the Oregon lode claim (which covers a part of the Lotta and a part of the Parish No. 2 claims) that it was to be located on behalf, and for the benefit, of defendant in error, and that any such attempted location was a subsequent location to the Lotta and Parish No. 2 lode claims, and made while the plaintiff in error or its grantors were in possession of said Lotta and Parish No. 2 lode claims, and that neither the said Corbus or his grantees had ever done any assessment work on said Oregon claim and that said claim had been abandoned and forfeited. Also, that if said Datson, who it is claimed made a second location of said Oregon claim in 1910, did make a location at

said time, it was on behalf, and for the benefit, of the defendant in error, and further that the same was made over and upon the Lotta and Parish No. 2 mining claims, the latter being prior locations of the plaintiff in error or its grantors, and for this reason the Datson location was void and of no effect and simply made to harass and annoy the plaintiff in error.

In regard to the Lindsay location of the Canyon lode mining claim, such attempted location was made by him on behalf of the defendant in error, and was made in, over, and upon the ground contained in the patented Lotta claim and Parish No. 2 unpatented claim while the said two latter mentioned claims were valid subsisting claims owned and possessed by the plaintiff in error; and, further, that part of said Canyon claim covers a part of the J. P. Corbus location of the Oregon claim and was invalid. It is denied that the miners' rules and regulations set forth in the answer were ever in force or effect, or that if they were in force or effect at the time that the plaintiff in error initiated its rights to the property in controversy they were repealed by the Act of May 17, 1884, being an Act entitled

> "An Act Providing a Civil Government for Alaska," 23 Stats. at Large, which provided for the reorganization of a civil government in Alaska, the extension thereof of the laws of Oregon and in Section 8 as follows *"And the laws of the United States relating to mining claims and the rights incident thereto shall,*

from and after the passage of the Act, be in full force and effect," etc.

And further alleges that if said rules and regulations ever existed, that they were inconsistent with said law and had fallen into disuse and had been abandoned, and never had been recognized by the Courts of Alaska since either party to this action made any claim to the property in dispute.

The plaintiff in error further claims in its reply that it has been in existence since the year 1895 and that since said time has been the owner and in possession of a group of quartz mining claims in what is termed Harris Mining District, on Gold Creek, near Juneau, Alaska. That all of said claims are contiguous and adjacent to each other and that among that group of claims are the Lotta and Parish No. 2 lode claims; that Gold Creek flows through and across the said group of mining claims and particularly the Lotta and Parish No. 2 lode claims. That before the plaintiff in error became the owner of this group of claims, its grantors or predecessors in interest had erected on one of the mill sites belonging to the group and near the upper end thereof a 10-stamp mill and had been engaged several years, before the plaintiff in error became the owner of the property, in opening up, developing and mining said mining claims; and in order to generate power for running said mill and mining property, had used the water of Gold Creek by diverting the same from said creek just above the 10-stamp mill. That in 1895 all of the above mentioned group of mining

claims were transferred to the plaintiff in error except a few locations that were made since that date, and among the locations made since that date is the Parish No. 2 claim, the claim in controversy, which was located by one William M. Ebner, on the 24th day of October, 1899, and afterwards, to-wit: on March 29, 1906, was conveyed by the said Ebner to the plaintiff in error, and since said time the said last mentioned claim has formed a part of the group in question; that since 1895 the plaintiff in error has been continuously engaged in opening up, developing and mining the property above referred to and the 10-stamp mill has been changed to a 15-stamp mill, and the necessary ore bunkers, air-compressors, machinery, etc., placed on said mines in good workmanlike style and the water of Gold Creek used for generating all of the power that was used in the mining and milling of the ores taken from said mines.

That on the 20th day of June, 1910, in contemplation of the enlarging and increasing the facilities to open up, develop and mine said property, one H. T. Tripp on behalf of said plaintiff in error located an additional 10,000 miners' inches of water of said Gold Creek to be diverted therefrom at a point on the creek near the point of the first diversion, and to be conveyed by ditch, flume and pipeline along the bank of said creek and conveyed to the mill site or place to where the 200-stamp mill was to be erected, as last above referred to, and applied and used for the developing, mining and milling of the ores to be

taken from said group of mining claims, which said location is prior to the locations made by defendant in error.

That immediately after the making of the location of the water by Tripp, the plaintiff in error commenced actual work looking towards the carrying out of the above mentioned plans for the opening up and developing of said property and mining the same on an enlarged plan.

That long before the commencement of this action, in order tocarry out the plans for increasing the out-put of said mines, the said plaintiff in error had surveyed and laid out a proposed working tunnel, which said working tunnel and mill site upon which the proposed 200-stamp mill is to be built are indicated upon the maps and plats introduced herein, one of which is found at page 1858 of the record marked "Defendant's Exhibit, No. 3," for identification in cause No. 835-A, and "Plaintiff's Exhibit, No. 1," in cause No. 803-A, and another marked "Plaintiff's Exhibit N," page 1850. These maps or plats also show what has been referred to as the group of mining claims belonging to the plaintiff in error and indicate the place where the tunnel crosses the Parish No. 2 and Lotta lode claims; also, the new flume that was built for the conveying of water from Gold Creek to the new mill site where the proposed 200-stamp mill is to be erected, and contains other data which will be referred to more particularly in the argument of this case.

The said mill site and tunnel route were selected

by the plaintiff in error long prior to the time that the defendant in error or its grantors made any pretended water location on Gold Creek or any pretended location of the Oregon or Canyon lode claims.

That on or about the ———— day of ———— 1910, while plaintiff in error's work was in progress, as above stated, the defendant in error attempted wrongfully to enter upon the Lotta patented and Parish No. 2 unpatented mining claims and take possession of a part of each against the will and consent of the Plaintiff in error; and in order to prevent such wrongful entry and trespass, the plaintiff in error commenced a suit in the district court for the District of Alaska, Division No. 1, Cause No. 803-A, and made application for a temporary restraining order restraining the said defendant in error from trespassing upon the Lotta and Parish No. 2 mining claims; that upon the hearing thereof, the court refused said restraining order upon the ground that there was a dispute as to the title to the property in controversy and that the plaintiff in error could suffer no irreparable damages by reason of the acts complained of and that plaintiff's remedy would be by an action in ejectment; hence, the filing of this suit.

That after refusal of the court to grant said temporary restraining order, the plaintiff in error continued its work that had already been begun on the Lotta and Parish No. 2 lode claims, and the said defendant in error continued making forcible entries upon said Lotta and Parish No. 2 mining

claims, and by force and by resorting to the issuance of warrants and continuous arrests of the employees of the plaintiff in error, defendant in error succeeded in constructing its dam and flume line in, over and upon the said Lotta and Parish No. 2 mining claims and ousted the plaintiff in error therefrom.

By agreement of the parties to this action, a jury was waived and the case went to trial before the court on the first and second causes of action set forth in the amended complaint and the answer of the defendant in error and the reply of the plaintiff in error.

Upon the trial of said cause, the defendant in error offered evidence to substantiate the matters, facts and allegations set up in its further answer to the second cause of action set forth in the amended complaint, which said further answer commences at or near the bottom of page 28 and extends to page 45 of the record; and all of the testimony and evidence that was offered by the defendant in error in proof of the allegations contained in said further answer, was permitted to go in over the objections made by the plaintiff in error, and to such ruling made by the trial court an exception was allowed. (P. R. 1073 and 1083.)

At the close of the trial of the case, and after the submission of all testimony and evidence on behalf of both of the parties to the action, plaintiff in error made its application to the court to amend its answer on page four thereof by setting up a further defense of forfeiture of the Parish No. 2 lode min-

ing claim set out and described and constituting the subject matter of litigation contained in the second cause of action of the amended complaint. The said further defense is found at pages 81 and 82 of the record. The plaintiff in error objected to said proposed amendment for the reason that it constituted a new, separate and distinct defense to the second cause of action contained in the amended complaint, and that such amendment could not be made and especially after all the evidence had been introduced in said cause, and that a plea of forfeiture was affirmative defense and if defendant in error desired to avail itself of such defense, it should have been set up in the answer in the first place and that plaintiff in error was taken by surprise by such offer or amendment, and after the argument of said objections, which were made in open court, the court made an order over-ruling said objections and permitting the setting up of said further defense of forfeiture (P. R. p. 83.)

The amendment in question is also found at page 24 of the record and is termed "2d-b."

After argument of said cause before the court on both questions of law and fact, the same was submitted to the court. On account of said cause being tried before Hon. Edward E. Cushman, who departed immediately after said trial to Fairbanks, Alaska, the following order was made by the court:

> *"It being orally stipulated by counsel that the files in this cause may be transferred from the First to the Fourth Division, that the Court*

may there settle the findings and make and enter judgment and rule upon the findings requested by either side; the papers to be then returned to the Clerk's office of the First Division for the final entry of judgment; that each side be allowed thirty (30) *days from the return of findings and judgment to the office of the Clerk of the court of the First Division, within which to prepare and file their written exceptions to such findings, judgment and decree; the Clerk to notify the attorneys of record on each side of the date of filing such findings, judgment and decree. That each side be allowed six* (6) *months from the date of the filing of the judgment in which to prepare, serve and file proposed bill of exceptions, if appeal or writ of error is desired to be sued out by either of such parties.*

Upon such stipulation it is so ordered by Court. Done in open court this 12*th day of June*, 1911.

EDWARD E. CUSHMAN, Judge."

That within the time required by law and the order of said court, findings of fact and conclusions of law by the respective parties were prepared and submitted to the court. The proposed findings of fact and conclusions of law of the plaintiff in error are found in the record at pages 1674 to 1677 inclusive, and pages 1677 to 1679 inclusive.

That on the 5th day of July, 1911, at Fairbanks, Alaska, the court made its order denying the findings so offered, tendered and requested by the plaintiff in error other than those given in the findings

which were made by the court, to which ruling of the court plaintiff in error excepted and the exception was allowed. (P. R. p. 1678.)

The Court then proceeded and made its own findings of fact and conclusions of law, the same being set forth in Vol. 1, of the record, pp. 85 to 91 inclusive. Immediately thereafter, and within the time required by law, the plaintiff in error filed its motion to set aside the findings of fact and conclusions of law so made and entered by the court, in so far as the same in any wise affected the Parish No. 2 lode mining claim, or the ownership of said mining claim by the plaintiff in error or the right, title and interest of the plaintiff in error to said minng claim, and to grant the plaintiff in error a new trial of its its second cause of action set out in its amended complaint. That thereafter, on the 5th and 7th days of July, 1911, the court made its separate orders over-ruling and denying said motion, which said orders are found at pages 1695 and 1696 of the record, to which orders of the court so made plaintiff in error was allowed an exception.

That on the 5th day of July, 1911, the court rendered its judgment or decree herein wherein and by the terms of which it ordered, adjudged, considered and decreed that the plaintiff have and recover of and from the defendant the possession of the said Lotta lode mining claim, according to the boundaries thereof, as set up in the amended complaint, and said court further considered, ordered, adjudged and decreed that plaintiff take nothing by its amend-

ed complaint except as to the Lotta lode mining claim, and the cause of action termed the second cause of action, appertaining to the Parish No. 2 lode mining claim was by said judgment or decree dismissed, to which ruling of the court pertaining to the said second cause of action, the plaintiff in error asked and was allowed an exception. (P. R. pp. 92-94.)

That within the time prescribed by the order of the court and stipulation of the attorneys representing the respective parties, the plaintiff in error filed its exceptions to the findings of fact and conclusions of law made by the court and those offered by the plaintiff and refused or modified by the court in so far as the same affected Parish No. 2 lode claim, and also included in said exceptions an exception to the action of the court in dismissing said second cause of action set up in the amended complaint and of which the Parish No. 2 lode mining claim is the subject matter of litigation. (P. R. pp. 1687-1692.)

Since the court adjudged the plaintiff in error to be the owner of, entitled, etc., to the possession of the Lotta lode mining claim, and that there is no cross appeal filed herein by the defendant in error, the only matter for the consideration of the court is as to the Parish No. 2 lode mining claim.

The writ of error in this case is prosecuted by the plaintiff in error from the findings and conclusions made by the trial court, the order of the court refusing to sign findings of fact and conclusions of

law tendered and offered by the plaintiff in error, the order over-ruling the motion for new trial in so far as the same, and each and all of the same, apply to the Parish No. 2 lode mining claim, and from that part of the judgment and decree of the trial court made and entered herein dismissing the second cause of action in the amended complaint, of which the last mentioned mining claim was the subject matter of litigation.

We believe the foregoing to be a full, true and complete statement of the case.

SPECIFICATIONS OF ERROR

I.

The Court erred in over-ruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in over-ruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein after the trial of said cause to amend its answer

herein by pleading a noncompliance of plaintiff in performing the annual assessment work upon the Parish No. 2 lode mining claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial case of said cause, over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of Southeastern Alaska, and in Harris Mining District, was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following findings of fact and conclusions of law offered and tendered by the plaintiff herein respecting Parish No. 2 lode mining claim, to-wit:

Finding No. 4 offered and tendered by plaintiff herein, which said finding is substantially as follows:

> *"That the plaintiff is now and has been for several years past, seized, possessed and entitled to the possession and the owner by discovery, location, staking and marking of the*

boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States, and doing and performing of the annual assessment work each and every year of the Parish No. 2 lode mining claim," etc.

And in not making and signing and filing Finding No. 5, offered and tendered by plaintiff, which requests the Court to find:

"That while plaintiff was so seized and possessed and entitled to the possession of the Parish No. 2 lode mining claim, the defendent some time in the month of August, 1910, *and before the commencement of this action, without right or title, entered into possession of part of Parish No. 2 lode mining claim and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff."*

And in not making, signing and filing Finding No. 6, offered and tendered by the plaintiff herein, which is substantially as follows:

"The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parish No. 2 lode mining claim as against the defendant and all persons and corporations whomsoever, and all of the surface ground thereof."

The Court also erred in not making the Find-

ings of Fact tendered and requested by plaintiff which are as follows:

(*a*) *"The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parish No.* 2 *lode mining claim for the years* 1907, 1908, 1909 *and* 1910 *and within the time in each of said years required by law."*

(*b*) *"The Court further finds that the annual assessment work required by law has been done and performed upon the Parish No.* 2 *mining claim for the years* 1908, 1909 *and* 1910."

(*c*) *"The Court further finds that the annual assessment work and labor has been done and performed upon Parish No.* 2 *lode mining claims each and every year since its location in the year of* 1899."

VI.

The Court erred in not making, signing and filing Conclusions of Law No. 1 and 2 offered and tendered by plaintiff, which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parish No. 2 lode mining claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parish No. 2 lode mining claim.

VII.

The Court erred in making and rendering its Finding No. 5, which is as follows:

"That the plaintiff is not and never has been seized, or entitled to the possession of that certain tract of ground described in paragraph III. of the plaintiff's second cause of action, set forth in the amended complaint herein and known and referred to as Parish No. 2 lode mining claim. That the ground claimed by the plaintiff as Parish No. 2 lode mining claim, was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could warrant or justify one in spending time, work, or money in its development or in the expectation of finding ore."

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parish No. 2 lode mining claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain and that at said time the property described in Parish No. 2 lode mining claim was a part of the unoccupied and unsegregated public domain of the United States. All of which said findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts

by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the district in which Parish No. 2 lode mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc.; and also Finding No. 9, in which the Court finds substantially that under the custom of miners the riparian propriator has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

> "*That the location known as Parish No. 2 lode mining claim is void and of no effect.*"

Said conclusion is without any evidence to sup-

port the same. The Court further erred in making Conclusion No. 5, which reads as follows:

> *"The Court further concludes that neither of the parties is entitled to recover costs in this suit."*

For the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta lode mining claim set forth and described in the first cause of action in the amended complaint, and by reason of this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

> *"It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by its complaint herein and except as to the Lotta lode mining claim, this cause and action be dismissed without costs to either side."*

XI.

The Court erred in over-ruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the bill of exceptions presented for said purpose on the 23rd. day of May, 1912. (P. R. pp. 117-123.)

ARGUMENT

We rely on the foregoing assignments of error to reverse the judgment and decision of the trial court and for a judgment in favor of the plaintiff in error upon its second cause of action or the granting of a new trial herein, but in the consideration of said errors assigned will treat the same in a consolidated form.

I.

The court below erred in not sustaining plaintiff in error's motion to strike that portion of the answer of defendant in error referred to in the first paragraph of plaintiff in error's specification of errors; or if the trial court did not err in not sustaining said motion to strike, it did err in over-ruling plaintiff in error's demurrer to said further answer of the defendant in error.

This action was brought, and is, in the nature of a suit in ejectment, seeking to eject the defendant in error from two certain lode mining claims, the Lotta patented and the Parish No. 2 unpatented claims. The defendant in error denies all the material allegations of the amended complaint and sets up separately what appears to be several separate answers to the matters contained in the amended complaint, none of which said separate answers pretend to be in the nature of a *cross-complaint* nor are any of them termed an *affirmative defense*, but merely answers to the two causes of action set forth in the amended complaint. Said answers are, in short, as follows, to-wit:

(1) That defendant in error is the owner of the Oregon and Canyon lode mining claims, which said claims conflict with the Parish No. 2 lode mining claim, referred to in the second cause of action of the amended complaint.

(2) That defendant in error claims the right to certain waters of Gold Creek, located by one L. D. Mulligan and conveyed to the defendant in error, which said water it purposes conveying by flume over and across the Oregon and Canyon claims, conflicting with the Parish No. 2 lode mining claim, to the place upon which it intends to erect a stamp mill, etc.

(3) The further answer to the second cause of action pertaining to the Parish No. 2 lode mining claim in which the defendant in error claims some rights under what it terms certain miners' rules and regulations, which were adopted for what is known as the Harris Mining District, Alaska, in the year 1882, and that the property in controversy is within said mining district and that such miners' rules and regulations pertain to the location and diversion of water from streams on the public domain and the conveying of the same across public domain to place of use and are still in force and effect; and further claiming that according to the customs of miners, recognized and observed in the Harris Mining District, etc., the defendant in error has:

> "*A right to construct ditches and flumes to be used in connection with the diversion and conveying of water over and across the public*

*domain, as well as over unpatented lode or placer claims, and under such customs, each miner or person operating a mine had a right to go upon unpatented mining claims of others and construct ditches and flumes over and across the same for the purpose of diverting * * * * * * * * the water to the place of application for the use and some beneficial purpose."*

No affirmative relief is asked by the defendant in error. The answer simply prays that plaintiff's amended complaint may be dismissed, etc. (P. R. p. 45.)

And it is this further answer of the defendant in error to the amended complaint that is moved against, and to which said demurrer was filed. It is evident that the gist of the defendant in error's defense is that it is the owner by reason of its Oregon and Canyon locations to the ground over which its flume passes, as well as the place where the water is diverted from Gold Creek. We do not see how the pleading could be otherwise interpreted; the purpose of alleging the ownership in the first instance of the two Oregon locations was to establish title in the defendant in error to the conflicting area with the Parish No. 2 lode, and was particularly a matter of affirmative defense or cross-complaint, requiring the same particularity in pleading to show the said claims were valid, subsisting lode locations. Mor. Min. Rights, 14th Ed. 40. It is not necessary, however, to spend much time here in presenting our view pertaining to either of the Oregon locations or

the Canyon location, for the reason that the trial court made its findings in relation to these claims, which are as follows:

> *"The Court further finds that the Oregon mining claim referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore.*
>
> *"The Court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect."* (P. R. p. 90.)

The only way that this further answer, which commences at page 28 and extends to page 45 inclusive of the record, could affect the present status of the case before this court is by reason of two findings that are made by the court, which are numbered 8 and 9 and found at pages 89 and 90 of the record, which said findings are made to in some extent conform to the allegations of this further answer pertaining to the miners' rules and regulations and customs pertaining to the location, diversion, conveying

and application of water to beneficial use, and it is for this reason we especially urge our motion to strike and demurrer, but will further on discuss these two particular findings made by the trial court.

Carter's Alaska code, page 157, Section 63, reads as follows:

> *"The answer of the defendant shall contain —First: A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Second: A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."*

The defendant in error in its answer, until it reaches this further answer to the second cause of action in the complaint, which is moved against, bases its rights of building the dam, diverting the water and constructing the flume absolutely upon its ownership of the property upon which it is doing work, claiming it is upon the ground of the two Oregon locations and the Canyon location, and hence seeks to establish its ownership in such water, but in this further defense moved against it seeks to claim the water by reason of the miners' rules and regulations set up therein, and the local customs which it claims prevail among miners of Southeastern Alaska, all of which pertains to the right of the defendant in error to build its dam and construct its flume

irrespective as to whether it is or is not the owner of the ground upon which the location is made or that which the flume line crosses; and, in this respect, we claim that the answer is inconsistent and sets up what we claim to be inconsistent defenses, and hence, on this ground, the motion should have been allowed.

As has been stated before, all these matters are set up in the answer—not by way of cross-complaint or affirmative defenses—but merely under a denial of plaintiff in error's title; and in this connection, in one distinct statement in the answer the defendant in error alleges ownership of the lode mining claims, and by reason thereof, a right to cross the same with a flume line; and, in the same breath, claims a right to cross over the Parish N. 2 lode mining claim under the miners' rules and customs; in other words, if it is not the owner of the property, then it has the right to cross the same under what it claims to be established rules and customs of the miners of Harris Mining District, Alaska; that is, it has an easement over the same, which, of course, is inconsistent to its claim of ownership.

> *"The owner of land cannot have an easement in his own estate in fee * * * as all subordinate derivative rights are necessarily merged and lost in the higher right..* (14 Cyc., 1188.)
>
> *"The owner of an easement cannot be the owner of the estate in which it exists. The right to the fee and the right to the easement,*

in the same estate, are rights independent of each other, though existing in the same estate. Each party may protect himself by appropriate actions, one to maintain his possession of the fee, and the other to protect himself in the enjoyment of his easement." (Newell on Ejectment, p. 31.)

That is to state, if both the aforesaid contentions of defendant in error, viz: (1) that it owned the mining claims from which the water was diverted and over which the flume line crossed; and (2), that under the rules and regulations of miners it had a right of way and easement for a flume line or ditch line across the mining property belonging to others, were set up as distinct defenses, we claim that they would be absolutely inconsistent with each other for if the defendant in error owned the title then the easement could not exist as it would be merged in such title. The motion to strike should have been allowed.

We submit the same argument on our demurrer to the defendant's further answer to the second cause of action stated in the amended complaint.

II.

The court erred in allowing the defendant in error after the close of the evidence to amend its answer by pleading a non-compliance in the performance of the annual assessment work upon Parish No. 2 mining claim and pleading a forfeiture.

As we have asserted in our statement, the trial court, *after all the evidence on the part of plaintiff in error and defendant in error had been submitted*, upon motion of the defendant in error, made and entered an order permitting the defendant in error to amend its answer by inserting a clause therein, setting up another defense to the second cause of action set forth in the amended complaint by stating substantially that if the plaintiff in error ever had any title in or to the Parish No. 2 lode claim, etc., that the plaintiff in error and its grantors had failed to do the necessary annual assessment work and labor, as is required by the statutes, and any such claim which the plaintiff in error may have ever had to such Parish No. 2 claim had been forfeited. (P. R. p. 81.)

The foregoing amendment is in effect a new and distinct cause of defense. What right or authority or discretion the trial judge had, *after all the evidence had been submitted*, to permit the defendant in error, over our objection, to amend its answer by adding to the general denial therein a paragraph pleading forfeiture, we are at a loss to conceive. Carter's Alaska Code, Section 92, page 163, provides as follows:

> "*The Court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons,*

it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense by conforming the pleading or proceedure to the facts proved."

We submit that the amendment so made substantially changed the other defenses which had theretofore been set up by the defendant in error, and added a new defense, *and it was error for the court to permit said amendment under the above section of the code.*

We further submit that even if the defendant in error had at the time of filing its answer included the paragraph in question, which the court after the trial of the case permitted the defendant in error to insert in its answer, that it could not have been considered for the reason that it would not have been specially pleaded. Under the section of the Alaska Code hereinbefore quoted, forfeiture would constitute a defense and should be set up separately. (Supra Alaska Code, Sec. 63, page 157.)

> *"An alleged forfeiture on the part of plaintiff must be specially pleaded by the defendant."*. (27 Cyc., 635; citing McDonald vs. Montana Wood Co.; 35 Pac., 658.)

In the case of McDonald vs. Montana Wood Co.,

supra, which was an action for trespass, the court stated in its opinion:

> *"But in this case a forfeiture was not pleaded by appellant in its answer, although the court below permitted evidence of the amount of work done on said claim for the year* 1891. *There is no evidence of a re-entry or relocation by any one on account of failure to do the required work by plaintiffs on said ground; nor does the defendant connect itself with any outstanding title adverse to plaintiff's, or plead any license or warrant to enter upon the ground in controversy.. We do not find anything in the record to support the plea of forfeiture."*
>
> *"A party relying upon a forfeiture by his adversary in these contests (to determine right to patent mining claim) for the possessory rights to mining claims must plead such forfeiture, must set forth the facts constituting the same, and prove them on the trial. The answer in the case denies the plaintiff's ownership, possession, and right of possession in the premises. It does not specially plead the forfeiture now claimed; it does not set forth the facts constituting the same; It does not inform the plaintiff that a forfeiture is to be urged, or the nature of the acts or omissions working such forfeiture. If defendant intended to rely upon a forfeiture by plaintiff, he has not observed the rules of laws governing that plea. He was properly not heard upon that plea in the court below, and*

cannot be heard now." (Wullf. vs. Manual, 23, Pac., 723.)

"*Party alleging forfeiture must prove it strictly; forfeitures are odious; the presumptions are all against it, and being a special incident not necessarily associated with the party's title, it should be alleged in the complaint or answer, that is, should be specially pleaded.* (Mor. Min. Rights, 563; Mattingly vs. Lewisohn, 35 Pac., 111.)

"*In an action of ejectment to recover the possession of mining ground, if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules and regulations of the mining district, the forfeiture must be specially pleaded. The reason given for this rule is that 'a defense based merely upon forfeiture does not involve a denial of the plaintiff's possession, or right of possession, at the date of the defendant's entry.*" (Steel, et. al. vs. Gold L. & S. Min. Co.; 1 Pac., 448; see also: Morenhaut vs. Wilson; 52 Cal., 268.)

"*Defendant relying upon an equitable defense to an action of ejectment must set up in his answer the facts constituting the same or it will not be considered.*" (27 Cyc., 645.)

In the case of Sherlock vs. Leighton, 63 Pac., 580, Potter, C. J., on page 581, says:

"*It is undoubtedly well settled that the party relying upon a forfeiture must allege and*

prove it, and the burden of proof in the first instance rests upon him to establish the forfeiture." (Copper Mt. M. & S. Co. vs. Butte & Corbin Con. Co., C. & S. M. Co., 104 Pac. 540.; See also Renshaw vs. Switzer, 13, Pac. 127.)

We conclude from the foregoing authorities that even if the defendant in error had in the first instance set up in its answer the clause which the court permitted it to insert after the evidence was in, that it would not have been sufficient pleading of forfeiture: (1) for the reason that it would have to be set up as a separate cause of defense, and (2) that the same is not sufficient in pleading the time and manner in which the forfeiture was brought about or caused; and further, the defense of forfeiture, if properly pleaded, is a distinct, new and separate defense and the trial court had no right to permit such amendment after the completion of the trial of the case, whether such amendment was made in the nature of a separate pleading or as any part of the defendant in error's answer.

III.

For the purpose of argument, we will proceed to present to this court our views of the various assignments of error contained under specification of error V. under one head; that is, the court erred in not making findings of fact and conclusions of law offered and tendered by the plaintiff in error, which are substantially to the effect:

*That the plaintiff in error was at the time of the commencement of the action, and for several years prior thereto, seized and possessed and entitled to the possession and the owner by discovery, location, staking and marking of the boundaries * * * * * and doing and performing of the annual assessment work each and every year, of the Parish No. 2 lode mining claim; and while so possessed was ejected therefrom by the defendant in error, and the further refusal of the trial court to make the findings offered and tendered by the plaintiff that the annual assessment work and labor, as required by law, had been done and performed on the Parish No. 2 lode mining claim* (1) *for the years* 1907, 1908, 1909 *and* 1910, (2) *for the years* 1908, 1909 *and* 1910, *and* (3) *that the annual assessment work and labor had been done and performed on said lode mining claim each and every year since its location in the year* 1899*; and further, that the court erred in refusing to make conclusions of law to conform with the findings of fact, which are referred to as conclusions of law Nos.* 1 *and* 2, *offered by plaintiff, and that plaintiff was entitled to a writ of ejectment to eject defendant from Parish No.* 2 *mining claim.*

And the assignment of error contained in specification of error VII., in which it is claimed that the trial court erred in making the following findings:

(1) *That the plaintiff is not and never*

has been seized, possessed or entitled to the possession of Parish No. 2 lode claim, and that said location was made for convenience and that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff in error or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in the development or in the expectation of finding ore;

(2) The further finding of the court, which is in substance *that the plaintiff in error did not, prior to the year* 1909, *perform the necessary assessement work on Parish No. 2 lode claim; and*

(3) The further finding by the court, which is stubstantially to the effect *that the defendant in error proceeded to erect a part of a dam on the public domain and that at said time the property described in Parish No. 2 lode mining claim was a part of the unoccupied and unsegregated public domain of the United States.*

For the sake of brevity and on account of a better presentation of the case to this honorable court, the foregoing assignments of error will be discussed and presented under the two following subheads:

(a)—We contend that it was shown upon the trial of this case by a great preponderance of the evidence, if not by the undisputed proof, that the

plaintiff in error or its grantors had prior to any intervening rights, made a good and sufficient discovery, location, staking and marking of the boundaries and posting and recording of the location notice of the Parish No. 2 lode claim; and

(b)—That since the discovery, location, staking and properly marking of the boundaries and the posting and recording of the location notice by the plaintiff in error or its grantors of the Parish No. 2 lode claim, that said plaintiff in error or its grantors have fully complied with the laws of Alaska and the United States in the doing and performing of the annual assessment work on said mining claim.

Under this sub-division "(a)" pertaining to location and marking of the boundaries, etc., we first desire to call the court's attention to the fact that it is conceded in the pleadings that both parties to this action are claiming the ground embraced in the Parish No. 2 lode claim, as mineral ground; the defendant in error alleges that its two locations of the Oregon lode claim, as well as the location of the Canyon claim conflicts with the ground contained within the exterior boundary lines of the Lotta patented claim, as well as the Parish No. 2; and further claims that it made a good and sufficient discovery of mineral-bearing rock in place on both of its Oregon claims and its Canyon claim before location thereof. Also on page 21 of the record, the defendant in error states "*that it is engaged in the business of opening up, developing and operating mines situated at or near Silver Bow Basin, Alaska, and that*

it is the owner and in possession of a large group of mining claims composed of 31 *patented and a considerable number of unpatented claims in and near Silver Bow Basin, along Gold Creek,*" and has been engaged in the mining of part of the same.

The undisputed evidence shows that all of the claims so owned and possessed by the defendant in error lie within a mineralized zone known to all miners of Alaska and to the United States Geological Survey as the "*Juneau Gold Belt*"; and that all of the mining claims so claimed and owned by the defendant in error are contiguous and adjacent and a part of them are contiguous and adjacent to the Parish No. 2 lode claim, and in this connection we call the court's attention to the map or plat offered in evidence in this case, apparently by both plaintiff and defendant, which is so marked and found at page 1858 of the record, also "*defendant's exhibit for identification No.* 50," found at page 1718 of the record, as well as "*defendant's exhibit No.* 7, *for identification,*" found at page 1722 of the record. The latter exhibit of the defendant shows a great many objects and a great deal of data that will be hereafter referred to in this argument, and shows also the pretended Oregon and Canyon claims, as well as the Lotta and Parish No. 2 lode mining claims and the manner in which these claims conflict, and with respect to this matter of conflict, we consider said exhibit practically correct. In regard to these other exhibits, we would like to at present call this honorable court's attention to the other mining claims be-

longing to the plaintiff in error which surround the Parish No. 2 claim, a large portion of which go to make up what we have referred to in our pleadings and statement as "*the Ebner group of claims*," and we call the court's attention to plaintiff's exhibit "N," being a map and plat offered in evidence and found at page 1850 of the record, which shows the 15-stamp mill belonging to the Ebner Company, boarding house, dump and air compressor, and many other objects of interest to which the court's attention will be called later. This 15-stamp mill is the one that is referred to in plaintiff in error's reply as having formerly been a 10-stamp mill and afterwards increased to 15-stamps. This mill has been run for years and used in mining and milling the ore taken from the surrounding mines belonging to the plaintiff in error. (P. R., pp. 153 to 159 inclusive.)

Southwesterly of the Parish No. 2 lode claim are several other claims belonging to the plaintiff in error and the defendant in error, and northwesterly is found the Humboldt lode claim, the Etta and Forrest lodes and other claims going to make up what is known as the Dora group of mining claims. Nearly all of these claims last mentioned have been patented and thereby passed upon by the Deputy United States Surveyors, as well as the Surveyor-General of Alaska, as being mineral claims, and carrying rock in place and valuable deposits of gold, and a portion of the claims belonging to both the defendant and plaintiff in error have been mined and milled for years at a profit.

We mention the foregoing facts for two reasons, to-wit:

(1) That when the mineral character of a mining claim is in dispute, it is always competent to show that the surrounding and adjacent property is mineral in nature and to what extent, and this is sometimes the very best evidence of the mineral character of the property in dispute.

> "*Evidence that land in the vicinity is mineral is admissible as proof of the character of the land in controversy.*" Mor. Mining Rights, 14 Ed., 237, citing U. S. vs. Rossi, et al, 133 Fed. 380.

In the above case, certified copies of mining locations on another of the creeks specified in the complaint locations and assay certificate of rock taken from land a mile and a half distant from the ground, the character of which was under consideration, was admitted in evidence in order to arrive at the question as to whether or not the said land was mineral or non-mineral in character.

Mr. Arthur C. Spencer, of the U. S. Geological Survey made his report in 1906, in Bulletin No. 287, at page 66, that the group of claims known a sthe "Ebner Group" are within what is known as the "Juneau Gold Belt." This is further corroborated by Mr. Alfred H. Brooks' report. Bulletin No. 259, made in 1904, at page 52, and his report made in Bulletin No. 284, issued in 1905, at page 37—all of these are public documents, which we refer the Court to

and ask the court to take judicial notice of the same.

(2) That in so much as both of the parties to this action are claiming the ground in dispute as being mineral, that the least amount of proof of a DISCOVERY is sufficient.

> *"In determing what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the difinition of the terms "lode" or "vein," that the tendency of the Courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surface boundaries * * *."* Lindley on Mines, Vol. 2, p. 605, citing Bonner vs. Meikle, 82 Fed., 697.

Judge Hawley, speaking for the Court (the Ninth Circuit) in the case reported in the 82 Federal above referred to, states:

> *"It was never intended that the Courts should weigh scales to determine the value of the mineral as between a prior and subsequent locator of a mining claim on the same lode."*

In a case which was appealed from the Commissioner of the General Land Office to the Secretary of the Interior, found at page 440 of Vol. XXI., Land Decisions, the Secretary, near the bottom of page 441, states among other things:

> *"The mineral character of the land in question is not here involved. That is conceded in*

*that both parties are seeking to acquire title to it, under the mineral laws. * * * The claimant was not required to show 'that said claim contains a valuable deposit of mineral.' It was no part of her defense. Nor was a contrary showing a part of the protestant's case.. Hence. the first reason given in the decision appealed from why said entry should be cancelled, viz: 'that said claim is not shown to contain a valuable deposit of mineral' is entirely outside of the issue, and is unwarranted by the evidence in the case."*

We do not like to make our brief unnecessarily long but as the trial court found against the plaintiff in error on the question of discovery on the Parish No. 2 claim, and made no particular finding at all on the marking of the boundaries, posting of notices, etc., we are compelled to feel that it is absolutely necessary for us to go into the evidence and testimony given on these points in addition to the other proofs above referred to, which tend to prove the mineral character of the claim in controversy. It is almost impossible from the record to get at the testimony and evidence on these points by way of a synopsis and for that reason we will have to give the questions that were propounded and the answers given by the respective witnesses in this respect.

Mr. Ebner, the original locator of Parish No. 2 lode claim, and a witness on behalf of plaintiff in error testifies as follows:

Q.— * * * * * What did you do with regard*

to staking out and marking the boundaries upon the ground of this lode claim which is described in this notice?

A.—Why, when I got ready to stake I took several men from the crew I had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction. (P. R. p. 163.)

Describes from plaintiff's Exhibit "B" the line brushed out. (P. R. p. 165.) That they set alder stakes on the Parish No. 2 claim; that the side line of the Parish No. 2 claim was merely a common side line of the Lotta claim. (P. R. pp. 165-166)

That they aimed to keep the Lotta and Parish No. 2 side lines identical. (P. R. p. 166.)

Q.— * * * * I will ask you to take this exhibit here, plaintiff's Exhibit "D," and ask you if any of these corner posts and stakes that you set for the Parish No. 2 were on any of the lines of the Lotta claim as indicated on this exhibit?*

A.—Yes, sir; the northeast corner of the Parish No. 2 was set as near as we could get it on the side line of the Lotta claim. (P. R. pp. 175-177.)

Q.—About how far from any of the corners of the Lotta claim?

A.—About 125 *or* 150 *feet from the northwest corner of Post No.* 6, *as given on this plat.* (P. R. p. 177.)

Witness testifies that they brushed out in a northwesterly direction; then crossed the creek and measured off with a tape line 600 feet, etc., and when they got 1,500 feet from the post, 125 feet south of Post No. 5 of the Lotta claim, they set a stake there which was the northeast corner stake of the Parish No. 2 claim. (P. R. pp. 177-178.)

Q.—As I understand it, you followed along the lower line of the Lotta claim right in a straight line, far enough to make the upper side line of the Parish No. 2 claim fifteen hundred feet?

A.—Yes, sir. (P. R. p. 178.)

Q.—And put a post at that corner?

A.—Yes, sir. (P. R. p. 178.)

That they turned at right angles and ran 600 feet. (P. R. p. 179.)

Q.—And what did you do there, if anything?

A.—Then, we turned at right angles and ran 1,500 *feet, and then turned at right angles and ran* 660 (600) *feet, and then came along here to see how near perfect this was because this turned, and it checked out. We measured all the way along up here until we got to the posts here — we measured clean around the claim, all around the claim.* (P. R. p. 179.)

Q.—Did you make any corner posts at these different corners?

Q.—Then, as I understand it, you staked out a claim there that was 1,500 *feet long, in-*

tended to be, as near as you could measure it?

A.—Yes, sir, at every corner we put a post.

A.—Yes, sir. (P. R. p. 179.)

Q.—And 600 feet wide?

A.—Yes, sir. (P. R. p. 179.)

Q.—What, if anything, in the way of precious metals did you discover upon the area which you have just described within the side lines and end lines of the Parish No. 2 claim?

A.—I discovered quartz in place carrying gold values, very near, within a few feet of where the location stake was set. (P. R. p. 180.)

Q.—Where did you set the location stakes?

A.—That stake, the location on the south, as I said, we went up 125 feet and then turned at right angles, went across and at 300 feet we set the corner post, this location stake came within a very short distance of the place where I had discovered quartz in place carrying gold, on the north side of what is called the Borean pit, the old placer pit mined years ago, and I discovered there rock in place carrying values where this crossed the creek. (P. R. p. 180.)

Q.—Where the old line—

A.—Where the old line crossed the creek, about four or five hundred feet from that, not exactly in the center of the claim but along in there I found where it carried values. (P. R. p. 180.)

Q.—This was all, as I understand it, within the exterior boundary lines of the Parish No. 2?

A.—Yes. sir. (P. R. p. 180.)

Q.—And near the center of the claim?

A.—Very near the center of the claim—we discovered it very near the center, within a few feet, probably. (P. R. p. 180.)

Witness testifies that after making discovery he had assays made and that the values ran from $1.50 to $2.10; that the general value of ores on mining property all up and down the creek were from $1.50 to $3.50, and such values compare very favorably with the value of the ore that witness has mined and milled. (P. R. p. 181.)

Witness testifies that in 1908 he had survey made, etc. (P. R. p. 195.)

Q.—Now, Mr. Ebner, that brushing out you did on what you are testifying about as being the lower side line of the Lotta, the brushing out you did in 1908,*—how did that compare with what you did in* 1899 *with respect to being over the same ground?*

A.—It was over the same ground,—the brush had grown up again but we could see the old stumps where it had been cut down. (P. R. p. 196.)

Q.—What about the stakes of the Parish No. 2. * * * * * *Have you done anything with respect to keeping that corner intact, or keeping it up since the Parish No.* 2 *was located?*

A.—No, I think the original stake is there. (P. R. p. 200.)

Q.—And what about the other corner stake you referred to, which was in a direct line or the projection of the lower side line of the Lotta?

A.—That stake in 1908 *was replaced by a larger stake.*

Q.—What did you find when you made that survey in 1908*?*

A.—I found it was getting old and it was rotting, so we made a larger stake there to put in place of it. (P. R.p. 200.)

Witness testified that the lode line stake of said Parish No. 2 *was not in place but they found where the monument had been. "We found where the rock had been piled around it," and witness knew where it belonged and where it was originally driven, etc.* (P. R. p. 201.)

This witness being recalled later during the trial, upon cross examination testified with reference to discovery on the Parish No. 2 substantially as follows:

Q.—So you went out there some time—was it August, 1899?

A.—It was during the latter part of the summer. I prospected around for some time before we started to locate them.

Q.—And your location notice described your discovery point?

A.—Yes, sir; within a few feet or a short distance; yes, sir.

Q.—I wish you would describe to the Court the appearance of that discovery.

A.—Why the discovery on the Parish No. 2, Mr. Shackleford, is just north of a pit, an old pit that was there.

Q.—The Borean pit?

A.—The Borean pit and the bedrock stuck out in one place there and showed quartz—that was the discovery for the Parish No. 2.

Q.—Is that bedrock there now?

A.—I think that that bedrock is blasted out. I think that is where the open cut was made.

Q.—It is blasted out?

A.—Yes, sir. (All above P. R. p. 715.)

Q.—After you got through sampling and blasting this rock did you leave any there that anybody could find any value in?

A.—I didn't carry any rock away except that which I used for assaying. (P. R. p. 716.)

Q.—Did you leave any rock of value there?

A.—Yes, sir. (P. R. p. 716.)

Q.—Could you show it to anybody now?

A.—Yes, sir. (P. R. p. 716.)

Q.—Where else?

A.—There is a point down the creek from the tunnel I started a little ways, and up on the bank there are some stringers that show there, and that is where we made the open cut, and there is quartz piled to one side now, some little of it left that the slide has not taken down and

some boards lying there. We had a large open cut there, some twenty-odd feet long and seven or eight feet wide, in order to get down to the solid rock, and there is some good pay-rock there. (P. R. p. 717.)

Q.—Not in place? *A.—Yes, sir.*

Q.—Can you show that?

A.—Yes, sir. (P. R. p. 717.)

Q.—And it will assay pay-rock?

A.—Yes, sir, take an average sample across there and it will assay. (P. R. p. 717.)

Q.—What is the width of that cut, the average sample?

A.—That cut was right across the formation, and, if I remember right now, there was some sixteen or eighteen feet there. (P. R. p. 717.)

Q.—Where is that cut? Make it on this map.

A.—I can do it approximately. Is the lower end of tunnel marked on here? (P. R. p. 717.)

Q.—Yes, it is right here—the upper is here and the lower one there. You are referring to the tunnel underneath the present Alaska-Juneau flume-line?

A.—It is the one close down by the creek; when the water is high, high water almost runs into it—it does run into it when it is high, very close to it, and it is just above that tunnel, down the creek, on the bank. I can mark that approximately. (P. R. p. 717.)

Q.—How far from that tunnel down the creek?

A.—It is probably 30 *feet or so down the creek and up on the bank. The bank is very high. I mark this here—it will be very approximate, because the bank slopes some there.* (P. R. p. 717.)

Q.—It is that open cut?

A.—It is in that open cut; yes sir. (P. R. p. 717.)

Q.—And the open cut is plainly visible?

A.—Yes, it is visible from the road now—I have marked it there with a lead pencil mark. (P. R. p. 717.)

Q.—How is it marked?

A.—I have made two straight marks. (P. R. p. 718.)

Q.—That is the two lead pencil marks just down the creek from the place marked tunnel?

A.—Yes, sir. (P. R. p. 718.)

Q.—Did you follow that up, that ledge up?

A.—No, we prospected that on the surface, done the work there and then started a tunnel below. (P. R. p. 718.)

Q.—In 1904 *you quit doing all your underground work?*

A.—I don't remember whether it was in 1904. (P. R. p. 718.)

Q.—It has been some years since you have done any underground work?

A.—Yes, sir. (P. R. p. 718.)

Q.—And you commenced working another part of the claim?

A.—Yes, we worked on another part. (P. R. p. 718.)

Q.—You know as a matter of fact, don't you, that that claim is out of the known value belt of the country through there?

A.—I don't know anything of the kind. I know there is value there. (P. R. p. 718.)

Q.—You want the Court to understand that the Parish lode was not located for any purpose of convenience in saving your rights?

A.—No, sir. (P. R. p. 718.)

Q.—To reach the other side of Cape Horn?

A.—No, sir. (P. R. p. 718.)

Q.—You had no such idea in mind at the time?

A.—No, sir; not at all. (P. R. p. 718.)

Q.—Do you know any other place—can you point me to any other place on the Parish lode where pay and rock in place can be found?

A.—Approximately, yes. (P. R. p. 719.)

Q.—Approximately?

A.—Yes, sir (P. R. p. 719.)

Q.—Where is it?

A.—Close to the Lotta line, and almost opposite the cabin, about thirty or forty feet from the Lotta line, in one of those cuts I made across there I found some good pay-rock. (P. R. p. 719.)

Q.—Is that on the Lotta or Parish?

A.—Parish. (P. R. p. 719.)

Q.—Up on the bank or down the creek?

A.—It is on the incline—it is all inclined there. (P. R. p. 719.)

Q.—I wish if you know any other place on the claim where there is pay-rock in place you would indicate it?

A.—On the Parish No. 2. (P. R. p. 719.)

Q.—On the Parish No. 2

A.—Well, right close to where I marked there, there is two crosscut ditches that I made —they are close together there, and there is pay on the same trend that that is marked, in both ditches. It shows there is a belt through there that carries pay. (P. R. p. 719.)

Q.—That is across the formation?

A.—That is across the formation; the formation trends northwest and southeast and these cross—my aim was to make these cuts cross the formation; it is about in this direction. (P. R. pp. 719,720.)

Q.—What year was it you discovered mineral in these other places—take, for instance, the place down underneath the present Alaska-Juneau flume, marked with two marks and near the tunnel?

A.—You mean right where the tunnel is? (P. R. p. 721.)

Q.—The place you call open cut, down near the creek from the tunnel?

A.—Oh, I think we started there along about 1901. (P. R. p. 721.)

Q.—When did you get through work there?

A.—We worked there several years in that open cut. (P. R. p. 721.)

Q.—And when did you discover the mineral? And where?

A.—We discovered the mineral on the edge as we started in—there was some showing of quartz on the edge at the break. (P. R. pp 721.)

Q.—Did you have it assayed?

A.—Yes, sir.

Q.—Have you got any record of that assay?

A.—I expect there is a record somewhere, but I wouldn't know where to look for it. (P. R. p. 722.)

Q.—Now, on the place marked over here near the house on the Lotta lode claim—when did you make that discovery?

A.—I made that discovery along in 1902 *or* 1903—*somewhere along there.* (P. R. p. 722.)

Q.—There is another place you mention besides that and besides the discovery point?

A.—Near the Borean pit? (P. R. p. 722.)

Q.—The one near the Borean pit is your discovery, is it not?

A.—That is the discovery. (P. R. p. 722.)

Q.—There is one a little ways down the creek from the tunnel there, I think you said below the open cut, another place down there?

A.—No. (P. R. p. 722)

Q.—That ground up there near the shack that is on the Lotta lode claim, is that solid formation?

A.—I got down to the solid formation, yes, sir. (P. R. p. 722.)

Q.—How deep did you have to go?

A.—Some places four or five feet—six feet in some places. (P. R. pp 722.)

Q.—The summer of what year?

A.—We worked there in the summer of 1899. *We started to do some of that work in* 1900 *and* 1901. (P. R. p. 723.)

Q.—Was the discovery made in 1899 *or* 1900*?*

A.—That discovery just below the cabin? That was not made until 1902 *or* 1903. (P. R. p. 723.)

Q.—And the discovery in the open cut near the creek?

A.—That was made, I think, in 1901, *that discovery there.* (P. R. p. 723.)

Q.—What time of the year was that?

A.—I don't remember just the time—it was the summer season. (P. R. p. 723.)

Q.—And the open cut here?

A.—You mean the Borean cut? (P. R. p. 723.)

Q.—Yes.

A.—That is our discovery and that is where we started work in the first instance—got the water in and got the dam in. (P. R. p. 723.)

Q.—How far is your discovery in the Parish No. 2 lode—your original discovery of 1899—*how far is it from there to the end line stakes* 3 *and* 4 *of the Parish No.* 2 *lode as indicated on this map?*

A.—You mean the discovery of No. 2*?* (P. R. p. 723-724.)

Q.—Yes.

A.—It is only a short distance. The discovery stake was not set right on the discovery—just a little south of it. (P. R. p. 724.)

Q.—Your location notice was posted in a tin can on your discovery stake?

A.—Yes, sir (P. R. p. 724.)

Q.—And it was just a few feet from the north end line of the Parish—I mean from the southeast end line of the Parish No. 2*?*

A.—From the southeast end line of Parish No. 2*, yes, sir.* (P. R. p. 724.)

Mr. Ebner testified concerning the discovery or discoveries having been made upon the Parish No. 2 lode claim prior to the year 1909 substantially as follows:

That in the year 1903 he continued the cross-cut ditches and the open cut and thoroughly prospected the ground where these ditches had been made the year before.

Mr. Shackleford, one of the attorneys for the defendant in error, objected to this testimony and it was stricken out by the Court and

the Court stated to the witness that he could state in a detailed way what work he did and what the work consisted of. Then the Witness Ebner proceeded to state that he stripped down to bed-rock, and took assays to ascertain where the values were, if any existed, across the claim; that he found that there were values and then that he, that same year, built a blacksmith shop and started the approach, or, what you might say, squared up for a tunnel. (P. R. pp. 211-212.)

LLOYD G. HILL, a witness on behalf of the plaintiff in error, was called as a witness, and at pages 250 and 251 of the record, testified substantially as follows, and referred to plaintiff's exhibit "N," to-wit:

That he went on the property in controversy in 1898 and at that time assisted in running the southwest side line of the Lotta lode claim, or the line 5-6 between stakes numbered 5 and 6, and at that time also practically ran over the north end lines of the entire Ebner group and also some of the southeast end lines, that would be the northwest end lines. He was over that claim when he made an official survey of the Idaho and Colorado claims (belonging to defendant in error) in the year 1904. The first time he saw any of the Parish stakes was in 1899. There were some small stakes there and he did not know what they were, and when making the

Colorado survey in 1904 he saw the common end line between the Parish No. 1 and 2. This common end line would be the southeast end line of Parish No. 2 and the northeast end line of Parish No. 1. It is line 3-4 of the Parish.

Also was on the Parish No. 2 in 1908 and assisted Mr. Wettrick in making an official survey of it; and saw stakes of said claim on the ground.

F. J. WETTRICK, U. S. Deputy Surveyor, witness on behalf of the plaintiff, testifies: That he surveyed the Parish No. 2 claim in 1908; that he made such survey for the purpose of locating the corners of the Parish No. 1 and No. 2. (P. R. p. 279.)

That he ran a line in a southeasterly direction on the westerly side line of the Lotta, etc., and found a post 5x5 two feet above the ground, that from that point he ran 600 feet in a southwesterly direction parallel to the end line of the Lotta claim, and found a post at the other end of that end line; that he then ran across the southwesterly end line, turned at right angles and continued up the line of the Parish claim and also ran in a southeasterly direction on the side lines of the Royal claim some distance and over the old slashing and rebrushed the line. (P. R. pp. 280-281.)

Witness also made further surveys of the Parish No. 2 in 1910, and found corner No. 5 on the side line common of the Parish No. 2 lode,

and Lotta lode, also monument 3 of the Parish No. 2 lode, also monument of the intersection of Forrest lode with the side line of the Parish and Lotta; also monument No. 2 of the Parish No. 2 lode, which is common to monument No. 1 of the Parish No. 1 lode. (P. R. p. 283.)

R. A. KINZIE, agent and superintendent of the defendant in error, testified on behalf of the said defendant in error pertaining to the mineral character of the Parish No. 2 lode claim, and the fact of there being a lead, lode or vein thereon and rock in place carrying gold, among other things, as follows, to-wit:

Q.—What, if anything, did you find upon the Oregon lode claim when you were first upon the ground in the way of quartz or other rock bearing values, in place?

A.—Why, it was the first time I had been on the ground and going up the Basin we covered the ground as included in the Colorado, Wyoming, Oregon and Idaho claims. The work that we were doing at the time was just over the line from the Oregon and on the Colorado. At the time we took some samples— I have forgotten exactly at what point and then made a general connaissance up the creek as far as we could go on the ground included in the Oregon claim and also up the hill on the Wyoming and the Oregon and on the lower part of the Colorado. We went over the ground and determined as far as we

could by looking at it the general line, the mineral zone passing through there and know we were trying at that time to determine the footwall of the main ore body.

Q.—What did you find in the way of rock in place, bearing gold or other precious metals at that time?

A.—Why, we found mineralzied schist and quartz in place. We made no assays at that time, but we thought it was mineral bearing, gold-bearing. (P. R. p. 761.)

Q.—Where was that rock in place found by you at that time on the Oregon, with reference to the location of the Parish claim, as indicated on this plat, exhibit 7?

A.—To the best of my recollection it was both on the south side and around the point. We went around the point, just above where the cabin, the Alaska-Juneau cabin, is now located —both on the north and south side of that point and around the point.

Q.—Please mark with a letter "a" on this plat the point as near as you can recall where you discovered that rock in place, of which you were speaking, bearing gold?

A.—Why, it was about a point in here—

Q.—Mark it with the letter "a."

(Witness does so.)

Q.—What kind of mineral did that rock carry in your judgment?

A.—Why, the country there is a broken up

shist containing iron pyrite and small quartz stringers—it is a pyrite principally. (P. R. p. 762.)

Q.—What does it carry—gold?

A.—Why, it does carry gold; sometimes less sometimes more.

Q.—When were you next upon the ground within the Oregon location as indicated here on the map and made any discovery of rock in place, bearing gold or other precious metals?

A.—Why, I was on the ground embraced in these four or five claims there a number of times each year afterwards. I wouldn't go to look for any particular discovery, assumed we had a discovery there in plain sight.

Q.—Where was the ore in plain sight on the Oregon lode.? I am not speaking now of the Colorado; I am speaking of the Oregon.

A.—Where Gold Creek and Snowslide Gulch had cut through—giving a cross-section of the country rock.

Q.—Where is that with reference to the point marked "a" by you?

A.—It is right in that general vicinity, both sides—you get a very good cross-section there on the north and south side of that point.

Q.—That is the same ore you saw in place there in 1900 *or* 1901 *whenever it was, when you were there the first time? A.—It was, yes.*

Q.—Now, Mr. Kinzie, do you know the ground covered within the boundaries of the

Parish No. 2 lode claim as platted upon this plat —have you been over that ground? (P. R. p. 763.)

A.—I know the south part or the south two-thirds of the claim very well.

Q.—Southerly two-thirds?

A.—Southerly two-thirds, yes; the northern part of the claim I am not so well acquainted with.

Q.—You know that if this Canyon claim, which you located, is a mining claim, with sufficient indications to convince you that there is something there to locate—if that Canyon claim has a point of discovery at the point you indicated on your map a while ago and has its side lines parallel to the Lotta lode claim and taking in part of the Parish and part of the Lotta—if that is true, you thought there was sufficient indications to make a location there?

A.—On the Canyon?

Q.—On the Canyon. A.—Yes, I thought so. (P. R. p. 827-838.)

Q.—You contend, do you, that so far as your judgment is concerned, there is no mineral-bearing rock, in place, at all between the creek and the upper end in line of the Parish lode No. 2.? A.—No.

Q.—You make no such contention as that?

A.—No.

Q.—Your Canyon claim, as you claim it is located, takes in a part of the Parish lode claim

No. 2, does it? (P. R. pp. 887-888.)

A.—I think the discovery is on the Parish—it is over the line that has been shown of the Lotta. We located it with the idea that it was above the Parish line. (P. R. p. 888.)

Q.—You not being satisfied with the old Oregon location you had a new Oregon location made over almost identically the same ground the old Oregon was made over?

A.—The second Oregon was made over almost the same ground, yes.

Q.—And not satisfied with those two locations you had another Canyon location made which covered a good portion of the ground of both the Oregon claims?

A.—No, sir, it covers entirely different ground. (P. R. p. 946.)

Q.—Do you know anything about it?

A.—I absolutely know.

Q.—When you take that location of the Canyon claim which is up the creek about 60 *feet from your dam and has a parallel line along there as the lode line of your discovery and then you take* 300 *feet on either side, don't you take a good portion of your Oregon claims?*

A.—We take a portion of them; yes. (P. R. p. 957.)

Q.—Then, you do know as a matter of fact that when you signed that answer you had nothing else in the world in there except the old Wy-

oming claim and the old location of Corbus to base your defense on in that suit?

A.—I think it was sufficient. (P. R. p. 957.)

B. D. STUART, a witness called in behalf of the defendant, testified as follows:

That he found quartz seams in place on the Oregon along the point of the hill, just above the point marked "Cabin," as indicated on Exhibit 7 above the flume; that it was such quartz as an assay for gold might be obtained from; that such point of discovery witness would say was 60 feet or more from the cabin and off the Parish No. 2 claim, as shown on Exhibit 7. P. R. pp. 970-971.)

On cross examination witness testifies that he came to Alaska last fall, the 15th of October, (1910) and that his principal work here has been surveying on Gold Creek for the defendant company in regard to the property in litigation. (P. R. p. 990.)

Q.—You said the formation or strike of the formation of the country runs approximately along those lines?

A.—I believe so; yes, sir.

Q.—Then the Oregon lode claim would not be made with respect to the formation?

A.—Not with respect to the formation—there are some quite prominent quartz seams that strike in a different direction. (P. R. p.

998.)

Q.—You don't know what discovery was relied upon in the location of the Datson Oregon claim, of your own knowledge?

A.—No.

Q.—Nor you don't know what discovery was relied upon in the Canyon claim, of your own knowledge?

A.—No. (P. R. p. 1004.)

W. R. LINDSAY, a witness called on behalf of the defendant, testified as follows:

That he was a surveyor employed by the defendant; that he has also taken a course in mining and engineering, and graduated from the University of Washington two years ago; that he made preliminary surveys of the Canyon claim and knows where the discovery is on said claims. (P. R. pp. 1036-1038.)

That he went in company with Whalen and Jones to what is known as the Borean pit, and found bed rock along the creek and then went over the hill to the pit and took samples of the rock there but could not find any indications of bed rock; that he found rock that looked the same as the boulder in the pit, etc. (P. R. p. 1039.)

On cross examination, witness testified that he never did any mining on Gold Creek or Silver Bow Basin; that he has examined rock in place in a good many different places; that the

first time he was in that section was a year ago. (P. R. p. 1041.)

That he knows the Oregon claim was located by Datson. (P. R. p. 1042.)

That he made the location of the Canyon claim and made a discovery and located it according to the strike of the country there. That there is rock in place on said Canyon claim; that there is no trouble in finding rock in place anywhere on Gold Creek from where he made discovery for 600 or 700 feet. (P. R. pp. 1046-1047.)

That the discovery on the Canyon claim is a distance of about 50 feet above the dam. (P. R. p. 1046.)

Q.—Did you go down Gold Creek this morning to see if you could find any rock in place, bed rock, down between your flume—the defendant company's flume and the creek?

A.—I seen the bedrock in place a good many times when I was there before.

Q.—The bedrock, now, that you speak of that you found at those places, do you mean it was mineralized rock?

A.—In places it assayed a little bit and in some places it did not.

Q.—Do you remember just where those places were?

A.—No, I don't remember. Up on the hill, I remember.

Q.—It shows it is mineralized?

A.—It shows it is mineralized; yes, sir.
(P. R. p. 1049.)

Proceeding with our argument under the third assignment of error and subdivision "a" thereof, we will continue along the line commenced, that is: WAS THERE A GOOD AND SUFFICIENT DISCOVERY MADE BY THE PLAINTIFF IN ERROR OR ITS GRANTORS ON THE PARISH NO. 2 CLAIM AT ANY TIME BEFORE ANY INTERVENING RIGHTS OF OTHERS?

As has already been stated, the Trial Court found that neither of the locations made of the Oregon lode claim by Corbus or Datson were good, but were void from the beginning, also that the Canyon location made by Lindsay was void and without effect from the beginning. Hence, no rights whatever were initiated under any one of these three locations, as from the findings of the Court these three locations were void ab initio. The above being true, the defendant in error has nothing to fall back upon, except what we claim was its wrongful entry upon both the Parish No. 2 and the Lotta lode claims in 1910, and the construction of a dam thereon and a flume line across the Parish No. 2; and if this entry was wrong, as we expect to show that it was, then no rights could be predicated upon it.

We have had printed in this brief considerable of Mr. Ebner's testimony showing the various discoveries that he made upon the Parish No. 2 claim prior to any one making claim to any part or portion of

said mining claim, and we will now attempt to summarize, giving the time and place that these discoveries were made. The first one made is the one that defendant in error made such a great ado about and was in or about what is referred to as the Borean pit, which is near the center of the southeasterly end line of the said Parish No. 2 claim near the point marked "open cut" on plaintiff's Exhibit "N." (P. R. p. 1850.) The witness Ebner testifies that this discovery was made when he was staking out and marking the boundaries of the mining claim in question.

Another discovery made at the same time, related in Ebner's own language, is: "Where the old line crossed the creek, about 400 or 500 feet from that, not exactly in the center of the claim but along in there I found where it carried value." (P. R. p. 180.)

Ebner further stated that after making discovery he had assays made and the values ran from $1.50 to $2.10; that the general value of ores on mining property all up and down the creek was from $1.50 to $3.50, and compared favorably with the ore that witness had mined and milled. (P. R. p. 181.)

Witness further states, in his own language, another discovery as follows: *"There is a point down the creek from the tunnel I started a little ways, and up on the bank there are some stringers that show there, and that is where we made the open cut, and there is quartz piled to one side now, some*

*little of it left that the slide has not taken down * * * * *. We had a large open cut there, some twenty-odd feet long and seven or eight feet wide, in order to get down to the solid rock, and there is some good pay-rock there.*" (P. R. pp. 716-717.)

Ebner was then shown a photograph that had been identified and afterwards introduced in evidence and marked: "Plaintiff's Exhibit "QQ," and found at page 1855 of the record, and stated that he had the picture taken and wanted to get in this quartz that was piled out and as much of the open cut as was possible, and that this photograph showed the result, and that this open cut was made in the year 1901 and that the quartz is on the bank of the creek, not over 10 feet from the bank, (meaning Gold Creek,) and that he was present when the picture was taken and that Exhibit "QQ" was taken right on the bank of the creek; that this photograph represents the open cut which he had before testified concerning. (P. R. pp. 1270-1272.)

Witness further states that he was present when the photograph marked "Plaintiff's Exhibit "PP" was taken: (Found at page 1853 of the record) that it represents the same formation, etc., as his other discovery at or near the Borean pit. (P. R. pp. 1270-1272.) The witness further states: "** * * there are two crosscut ditches that I made—they are close together there and there is poy on the same trend that that is marked, in both ditches. It shows there is a belt through there that carries pay.*" (P. R. p. 719.) Witness further states that these

two cross-cut ditches were made close to the Lotta line and almost opposite the cabin on the hill and about 30 or 40 feet from the Lotta line, and in one of them good pay-rock. (P. R. pp. 718-719.) Also see "Plaintiff's Exhibit "N" (P. R. p. 1850) with two parallel cross lines, which the witness made to indicate the cross-cuts, which are near the south-easterly corner of the Parish No. 2 claim and near the figures "13758." (P. R. p. 721.)

Witness further testifies that there was another discovery made by him in 1903 while he was doing the assessment work. In that year while doing the assessment work he stripped down to bed rock and took assays to ascertain where the values, if any, existed across the Parish No. 2 claim, and found that there were values, and that that same year he built a blacksmith shop on the Parish No. 2 claim and started the approach of a tunnel. The witness then identified "Plaintiff's Exhibit 'M' " and pointed out the tunnel. (P. R. pp. 212-213; Ex. 1854.)

There being no intervening rights of the defendant in error, all these discoveries were good as against it.

> "*If a location is made before discovery, but is followed by a discovery* * * * * * before any *adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid.*" (Mor. Mining Rights, 14 Ed., 36, citing numerous authorities.
>
> "*A location is made valid by the discovery*

of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same lode by other persons." Jupiter Min. Co. vs. Bodie, XI. Fed., 666. See also Nevada Sierra O. Co. vs. Home O. Co., 98 Fed., 674; Waskey et al vs. Mammer et al, 17 Fed., p. 31.)

All these discoveries made by Mr. Ebner are undenied except that one claimed to have been made at or near the Borean pit, and there was some dispute on the trial of the case as to whether or not the discovery at the Borean pit was rock in place or slide—plaintiff in error's witness testifying that it was rock in place, and some of defendant in error's witnesses testifying that it was not—but we do not think that there was any dispute over the question that the rock at that place carried values and the particular stratification that carried the values had the same dip as was found in rock further up on the hill that was conceded to be in place. We do not see how this could well be and then the rock be slide. No one ever reached the depth of this rock at Borean pit, although defendant in error, during the trial, made several attempts to do so but failed. It offered many photographs showing the formation at that place and did a great deal of excavation work around this formation, which was done in a manner calculated to make it look as much like slide rock as possible. However, there are so many other discoveries made by Mr. Ebner, which are practically undenied by the defendant in error, and are to a great ex-

tent corroborated by the witnesses of the opposing party, that we do not care to take the time to dwell any further on the question as to whether the discovery made at or near the Borean pit is or is not rock in place. We invite the Court's careful attention to the portions of the testimony of Mr. Ebner set out in this brief, as well as to other portions of it in the printed record.

R. A. KINZIE, Agent and General Superintendent of the defendant in error, was called upon to testify in behalf of his company and was asked when he first went upon the Oregon lode claim, which was located by J. P. Corbus in 1899, and when he first ascertained that there was any rock or quartz in place carrying values. He answered substantially that he had been on the ground and covered all the ground as included in the Colorado, Wyoming, Oregon and Idaho claims and at the time took samples but had forgotten at just what point they were taken; that he made a general *connaissance* (reconnaissance) up the creek as far as he could go on the ground in the Oregon claim and also up the hill on the Wyoming and the Oregon claims and on the lower part of the Colorado; and, using the plural, said: "We went over the ground and determined as far as we could by looking at it the general line, the mineral zone passing through there and know we were trying at that time to determine the footwall of the main ore body." * * * * * "* * * We found mineralized shist and quartz in place. We made no as-

says at the time, but we thought it was mineral bearing, gold-bearing." (P. R. pp. 761-762.)

We would like to here call this Honorable Court's attention to defendant's Exhibit 7, (P. R. p. 1722) which we have heretofore referred to in this brief, which shows, among other things, the Lotta lode claim, the exterior boundary lines thereof, as contended by us on the trial, and the exterior boundaries thereof, as contended by the defendant in error; also showing the Oregon lode claim, as located by Datson, also the exterior boundary lines of the Parish No. 2 claim and the Canyon claim, which was located by Lindsay. The said exhibit shows the mining claims referred to, as contended for by the respective parties to the suit, practically correct. The Court decreed the Lotta claim to the plaintiff in error, as was contended for by it. The witness Kinzie referred to this plat considerably in his testimony and in his answer to the question as to where the rock in place was found by him at the time he went over the Oregon, as above related, referred to this exhibit and answered the question as follows: "To the best of my recollection it was both on the south side and around the point. We went around the point, just above where the cabin, the Alaska-Juneau cabin, is now located—both on the north and south side of that point and around the point." (P. R. p. 762.) The cabin referred to is marked on Exhibit 7 and is on the southwest corner of the claim. This further question was then propounded to the witness Kinzie:

Q.—Please mark with a letter "a" on this plat the point as near as you can recall where you discovered that rock in place, of which you were speaking, bearing gold?

The witness marked "a" on the exhibit above the cabin close to the flume line of the defendant in error, and very near the lower side line of the Parish No. 2 lode claim. The witness further said that this discovery was made *about* at that point. Then the following question was propounded to the witness:

Q.—What kind of material did that rock carry in your judgment?

A.—Why, the country there is broken up shist containing iron pyrite and small quartz and carries gold; sometimes less, sometimes more. (P. R. pp. 762-763.)

The witness further stated that this discovery that was made was in plain sight, and when asked the question: "Where the ore was in plain sight on the Oregon lode," he answered: "Where Gold Creek and Snowslide Gulch had cut through, giving a cross-section of the country rock." The witness was then asked: "Where is that with reference to the point marked "a" by you?" and answered, "It is right in that general vicinity, both sides—you get a very good cross-section there on the north and south side of that point;" and then further stated that this is the same ore that he saw in place in 1900 or 1901; that he is acquainted with the south part or the southeast two-thirds of the Parish No. 2 claim very well,

but that he is not so well acquainted with the north part of the claim. (P. R. pp. 763-764.)

The witness further stated that he was acquainted with the Canyon lode claim and knew where the discovery point was thereon and thought that there was sufficient indications to make a location and further stated that he had not made any contention that there was not any mineral bearing rock in place between the upper end line of the Parish No. 2 claim and the creek; that he thought the discovery made on the Canyon claim was on the Parish No. 2 claim.

MR. LINDSAY, who located the Canyon claim, stated that at the time he made the location he made a survey of it and that he was in company with a man by the name of V halen; that he had been up to the place called "Borean pit" and found bed rock all along the creek and stated that he knew the Oregon lode cliam. That he made a discovery on the Canyon claim and located it according to the strike of the country; that there is rock in place on the Canyon claim and that there is no trouble in finding rock in place anywhere on Gold Creek where he made the discovery for 600 or 700 feet; that the discovery on the Canyon claim is about 60 feet above the Alaska-Juneau dam. (P. R. pp. 1038-1042.(The dam referred to is the dam of the defendant in error, relative to which the Court made a finding stating that it was partly on the common side line of the Parish No. 2 and the Lotta claims, and is indicated on Exhibit 7 by a line drawn across Gold Creek on or near

the lower side line of the Lotta, as was established by the Court's decision. (P. R. pp. 1044-1045.)

Witnes was then asked:

> *Q.—Did you go down to Gold Creek this morning to see if you could find any rock in place, bed rock, down between your flume—the defendant's flume and the creek?*
>
> *A.—I seen the bed rock in a good many places when I was there before.*

Witness further states that it was mineralized rock and in some places it assayed a little bit and in others it did not * * * that he did not remember just where those places were * * * that he saw some up on the hill that was mineralized rock. (P. R. p. 1049.)

B. D. STUART, a witness on behalf of the defendant in error, stated that he was a mining engineer and that he saw the rock in place which the witness claimed was a discovery on the Oregon lode claim, and stated that the Oregon location was not made with respect to the formation but that there were some quite prominent quartz seams that strike in different directions. (P. R. p. ——.)

It seems that in the testimony of the various witnesses that they have used the words "bed rock" inter-changeably with "rock in place bearing gold or mineralized rock." On the said Exhibit 7 of the defendant there is marked "bed rock" near the center of the Parish No. 2 claim and one on either side of the flume. They are about in the same place

that Mr. Ebner testified that he made a discovery.

We claim that the testimony of these last three witnesses just above referred to corroborate Mr. Ebner's testimony as to his discoveries which he testified concerning, and we think that we can demonstrate it in a few words and will refer to the defendant in error's Exhibit 7 in doing so.

Kinzie testified, and it was corroborated by the witness Stuart, that the discovery on the Oregon claim is in the *vicinity* of the letter "a" on the Exhibit in question; and the witness Kinzie further claims that when he first went on the Oregon claim he went its full length or as far as he could go up the creek and made a general examination of the formation and that he did so with the intention of finding out where the mineralized zone passed through there; that he found mineralized shist or quartz in place which was mineral-bearing or gold-bearing. That this was both up and down from the discovery point marked "a." The witness Lindsay testified that he saw mineralized rock (rock in place) all along up and down the creek, just below the flume line. This witness also testifies that the discovery point on the Canyon claim is only 60 feet above the dam on Gold Creek, which means just 60 feet from the upper side line of the Parish No. 2. The witnesses of the defendant in error have testified to such facts concerning discoveries made on the Canyon and Oregon claims and the nature of the surrounding country so as to absolutely prove that all up and down Gold Creek, as it crosses the Parish No. 2 claim,

there is gold-bearing rock in place. The defendant in error's witness Lindsay, who located the Canyon claim, testified that his discovery was on Gold Creek, just 60 feet above the dam, which said dam is on the upper side line of the Parish No. 2 claim; and further, to the effect that there was mineralized or gold-bearing rock up and down the creek 600 or 700 feet from said point of discovery, which means, that such rock can be seen up and down the creek the entire width of Parish No. 2 claim.

If this testimony of the witness of the defendant in error is true, then it corroborates Mr. Ebner's uncontradicted testimony wherein the latter swore to several discoveries made upon the Parish No. 2 mining claim, and hence the Court should have signed and filed the finding which we tendered which emgbraced the fact that we had made a good and sufficient discovery upon the mining claim in question, and the court erred in making the finding that it did make concerning this matter.

The last question to be considered under subdivision "a" of assignment of error III. is the question of the staking and marking of the boundaries of the Parish No. 2 lode claim by Mr. Ebner, the grantee of the plaintiff in error.

We shall not consume much time in presenting this feature of the case to the Court for the reason that by the Trial Court's finding establishing the boundary lines of the Lotta patented claim, as contended for by the plaintiff in error, and the Lotta being one of the oldest patented claims on the creek,

having been patented for 20 or 22 years, *it is itself a permanent monument.* The location notice of the Parish No. 2 ties up that claim to the Lotta lode claim, and to the Lotta lode claim as it is established by the Court; and in this connection, we call this Honorable Court's attention to the location notice of the Parish No. 2 lode claim found at pages 1659 and 1660 of the record.

We briefly present to the Court some of the undisputed evidence in the case pertaining to the subject matter under discussion.

After Mr. Ebner had been questioned about the location notice just referred to, and had identified it as a copy of the one that was posted on the ground at the time of staking, (P. R. p. 161), he proceeded to testify that when he got ready to stake the claim, he took several men from the crew that he had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction; (P. R. p. 163) and that he proceeded to brush out the southwesterly side line of the Lotta claim, and referring to plaintiff's Exhibit "N" (found at page 1850 of the record), stated that he started to brush out at Post No. 5 of the Lotta claim and brushed along the southwesterly side line of that claim to corner No. 6 of said claim and continued to brush along such line down to near the creek, and made a somewhat preliminary survey of the Parish No. 2 claim. (P. R. p. 167.) That he then proceeded to brush out the boundaries of Parish No. 2 claim and proceeded to set the northeast corner post of the same, and referring

to the corner posts of the Lotta claim and to plaintiff's exhibit "N", the witness stated that he called post No. 6 the northwest corner post and post No. 5 the southwest corner post. Witness still further stated that he set big alder stakes, some of them three inches in diameter, at all corners of the Parish No. 2 claim, and that the Parish No. 2 claim and the Lotta claim had one side line in common almost throughout its entire length, and that witness sought this method of staking out the Parish No. 2 claim in order to tie it up to the Lotta claim. (P. R. pp. 165-6). And also that a location stake was set near the center of the southwesterly end line of said Parish No. 2 claim, near what is termed "open cut" on Exhibit "N", and also within a short distance of the discovery made at the Borean pit; and that he followed on down the center of Parish No. 2 lode claim and made a discovery at or near the bank of the creek in the center of the claim. (P. R. p. 180).

Witness then testified that he was on the claim again in 1908, and that whatever new stakes were needed that he reset them. (P. R. p. 201).

LLOYD G. HILL testified that he was on the ground embraced in the Lotta and Parish No. 2 claims in the year 1898 and aided and assisted in running the southwesterly side line of the Lotta claim, which is marked between the figures 5-6, and that he was over both the Lotta and the Parish No. 2 lode claims in the year 1904, when he made an official survey of the Colorado lode claim belonging

to the defendant in error, and that he saw the stakes of the Parish No. 1 and No. 2 in 1899, and that during the time that witness was making the survey of the Colorado claim in 1904 he saw the stakes at the corners of the common end line between the Parish No. 1 and Parish No. 2, and this would be the southeast end line of Parish No. 2 and the northwest end line of Parish No. 1 and between corners numbered 3-4 on Exhibit "N." (P. R. pp. 252-253.) found other stakes. (P. R. pp. 280-281.)

That witness at the same time saw posts Nos. 5 and 6 of the Lotta lode claim, as indicated on Exhibit "N" and they were in the same place when he saw them in 1899. (P. R. 251-252). The witness further stated that he was again on Parish No. 2 mining claim in 1908 and assisted Mr. Wettrick, U. S. Deputy Surveyor, in making some surveys in that neighborhood, and that at that time he saw the stakes of the Parish No. 2 claim in the same place in which he had formerly seen them.

F. J. WETTRICK, U. S. Deputy Surveyor, testified that he made a survey of the Parish No. 1 and No. 2 claims in the year 1908 for the purpose of locating the corners of these two claims. (P. R. p. 279). That at that time he ran the westerly or southwesterly side line of the Lotta claim, he saw a stake which was 5x5 inches and stood two feet above the ground, and that he ran several other lines of the Parish No. 2 and the Lotta claims, and found other stawes. (P. R. pp. 280-281).

The witness further testified that in 1910 he

made an official survey for patent of the Parish No. 2 and referring to Exhibit "N" found corner No. 5 on the side line common to Parish No. 2 and the Lotta lode claim, also monument No. 3 of the Parish No. 2 lode claim, and the monument at the intersection of the Forrest lode with the side line of the Parish No. 2 and the Lotta; also monument No. 2 of the Parish No. 2 lode claim, which is the same as monument No. 1 of the Parish No. 1 lode claim. (P. R. p. 283).

All of the foregoing evidence and testimony is undenied, and we submit to the court that if the same is true, that the Parish No. 2 lode claim was properly staked and marked upon the ground by brushing out the exterior boundary lines of said claim and setting of proper monuments and maintaining the same, and that the said claim was properly tied up in the location notices thereof to a permanent monument, hence, the Court should have made our finding tendered to this effect.

(*b*)—*Under this subdivision, as hereinbefore stated, we contend that since the discovery, location, staking, etc., of the Parish No. 2 lode mining claim, that the plaintiff in error and its grantors have, each and every year since the year* 1899, *that being the year of the location of the claim in question, fully performed the annual assessment work on said mining claim and have fully complied with the laws of the United States and Alaska in this respect.*

The Trial Court found that for the years 1909 *and* 1910 *that the plaintiff in error complied with the above mentioned laws and did do and perform a sufficient amount of labor and work upon said mining claim to comply with the law regarding the doing of annual assessment work upon mining claims in Alaska* (P. R. p. 88). *The printed record is so large and voluminous in this case and the Trial Court having found that we had not complied with the law in regard to the doing of annual assessment work on this mining claim in question for the years* 1900 *to* 1908 *inclusive, we deem it necessary, to save this Honorable Court much labor, to segregate from the massive record all of the testimony and evidence given on the trial of the case pertaining to the annual labor and assessment work done and performed for the years* 1890 *to* 1908 *inclusive, and we are of the opinion that when this is done, that we will have shown plainly to this court that the Trial Court erred in its finding in respect thereto.*

WILLIAM EBNER, a witness on behalf of the plaintiff, substantially testifies as follows:

That he resided in Juneau, Alaska, from 1890 up to about eight months preceding the commencement of this action; that during all of said time, he was engaged in mining. (P. R. p. 138.)

Witness identifies plaintiff's Exhibit "B,"

being a map showing group of mining claims, among which is the Parish No. 2. (P. R. p. 153.) (See also map P. R. p. 1809.(That he first became acquainted with the mining property in 1891. (P. R. p. 154.) That he located the Parish No. 2 mining claim by staking out and marking the boundaries, etc. (P. R. p. 160.)

Testifies to posting notice, etc., and identifies location notice recorded in the office of the Commisioner of the Juneau Recording District, Alaska, as copy of the notice so posted upon Parish No. 2 claim. (P. R. p. 161.) That he saw such notice upon said claim a year and a half afterwards. (P. R. p. 161.)

Q.—Who built that monument in the first instance?

A.—I did. (P . R. p. 201.)

Q.—When you first staked the claim?

A.—Yes, sir. (P. R. p. 201.)

Witness states that this was the lode line stake.

Witness states that he was on the Parish No. 2 claim last fall, and saw some of the original stakes on said claim. (P. R. p. 203.)

Q.—What year did you first commence doing assessment work on the Parish No. 2.

A.—In 1900.

Q.—Mr. Ebner, I will ask you if you have any records or recollection as to the number of days' work that was done on this claim in the year 1900?

A.—No. I couldn't go into detail. I put my men—took them out there and kept them to work at their regular wages until I had performed $100, *until the required amount of money or work had been done and money expended at their regular wages. One man would get* $2.00 *and his board and the other probably* $2.50. (P. R. 205.)

Q.—I will ask you what kind of work and the character of work you did in 1900 *in performing your assessment work on this claim?*

A.—We made an open cut on the Parish No. 2 *just above the creek, where there is a very heavy spring comes out. We made an open cut there and then went to work and turned in some water and commenced, and did, I think, wash out or partially so, so as to get down to the surface, to the bedrock, one ditch leading towards this open cut. I don't remember just the value of each one separately, but those two items together cost in actual expenditure, wages paid to men, more than one hundred dollars.* (P. R. p. 206.

Q.—How much did that improve that claim as a mining claim?

A.—I consider that it improved it at least the amount of money expended. (P. R. pp. 206-207.)

Witness testifies that in 1900 they brought the water to said claim from said Snowslide Gulch by ditch, etc.; repaired the old dam, etc.,

cut the roots and sod down to bedrock leading to this open cut, for the purpose of exposing the bedrock. (P. R. p. 207.)

Q.—You said something about a dam being up there and some stream that comes down from Snowslide Gulch. Explain to the Court the nature of that dam that was there in 1900.

A.—Well, the dam, is in a narrow point and there is a ditch cut on the side—this is in Snowslide Gulch itself—and it is a natural dam to a certain extent, and a dam that was built there years and years ago and a portion of the old dam is still there, and every year a portion of the snow and rock and snowslides takes off the top and that has to be rebuilt to throw the water into the ditch and divert it. (P. R. pp. 207-208.)

Witness states that the object in keeping up the dam was to use water for sluicing and developing the Parish No. 1 and Parish No. 2 mining claims. (P. R. p. 208.)

Q.—What do you mean by sluicing on a quartz claim?

A.—Sluicing—that is to wash off the surface and expose the bedrock. (P. R. p. 208.)

Q.—Then, the next year, 1901?

A.—In 1901 *we continued this same work and done practically the same thing. I think in* 1901 *we completed this ditch across, or very near across, the claim.* (P. R. p. 208.)

Witness testifies that the value of the work

in 1900 and 1901 on said Parish No. 2 claim, and the amount paid out for such work for said years, was more than one hundred dollars each year. (P. R. p. 209.)

That in 1902 work was done altogether on ditches to the witness's best recollection, and that such work uncovered the formation of the ground in the mining claims. (P. R. p. 210.)

Q.—In doing this sort of work, from a miner's standpoint, do you wash away the dirt and expose the vein so as to judge of its value and the formation, etc., of the claim?

A.—Yes, sir. (P. R. p. 210.)

Witness testifies that the amount paid for the work and labor done upon Parish No. 2 mining claim in 1902 was fully one hundred dollars, probably a little more than one hundred dollars. (P. R. p. 211.)

That in 1903 these ditches and open crosscuts were continued and the ground thoroughly prospected where these ditches had been made the year before. (P. R. p. 211.)

The Court upon motion of counsel for defendant struck out that portion of witness' answer in which he stated he thoroughly prospected the ground. (P. R. pp. 211-212.)

BY THE COURT:—You can state in a detailed way Mr. Ebner, what work you did—what this work consisted of.

A.—Why, it was stripped down to bedrock, so I could get to the bedrock and I took as-

says to ascertain where the values, if any, existed across this claim. I found that there were values and then I made, that same year, we built a blacksmith shop and started the approach or what you might say squared up for a tunnel. (P. R. p. 212.)

Q.—This work that you have been doing these years that you have dsecribed—I will ask you, Mr. Ebner, what was the purpose of performing this kind of work on this claim?

A.—In the first place, I found some values when I located the ground. I wanted to ascertain if there was more values and where they were, for the purpose of starting a working tunnel and thoroughly and systematically and in a business-like way develop the claim. That was the purpose of it. (P. R. p. 212.)

Q.—I will ask you if you did start such tunnel?

A.—Yes, sir. (P. R. p. 212.)

Q.—What year did you start the tunnel?

A.—In the year 1903. (P. R. p. 212.)

Q.—Do you remember approximately upon what portion of the claim you started this tunnel?

A.—On Parish No. 2. (P. R. p. 212.)

Q.—What portion of the claim?

A.—Near the center of the claim, very near the center of the claim, I should judge, both in length and width—not quite the center of the claim in width but near the center.

Witness identifies photograph marked plaintiff's Exhibit "M," which was later offered and received in evidence, showing the tunnel referred to. (P. R. p. 213.)

Witness testifies that in 1904 about ten feet of said tunnel was driven, also some work in the Borean pit; that the blacksmith shop referred to herein was built on the Parish No. 2 claim. (P. R. p. 215.)

Q.—Did you use that blacksmith shop for anything?

A.—Yes, for sharpening tools, for sharpening the drills. (P. R. p. 215.)

Q.—What were you going to do with the drills, use them?

A.—Yes, driving the tunnel. (P. R. p. 215.)

Witness testifies that the amount paid for the work done in 1904 was something over one hundred dollars. (P. R. p. 215.)

Q.—What was your purpose in running this tunnel?

A.—The purpose was to drive that in under the Parish No. 2 for the purpose of developing the claim and the work in the Borean pit was for the purpose of developing the lode as it was exposed. (P. R. p. 216.)

Q.—Now, this work that you had been doing prior to 1904,—*I will ask you whether or not that was any assistance to you in judging*

where to locate this working tunnel that you commenced?

A.—It was, the ditches and trenches I cut across were. In other words, I wanted to know if there was any value in there and where and what direction to drive, and if there wasn't anything there, there wouldn't be any use in starting a tunnel. (P. R. p. 216.)

Witness testifies that he was on the Parish No. 2 claim in 1905; that the work done on said Parish No. 2 mining claim in 1905 consisted in driving the tunnel and work upon the Borean pit but principally in the tunnel.

Witness does not remember the exact number of feet, as it was done by day's work; that the amount for the work done in 1905 on the Parish No. 2 claim was more than one hundred dollars. (P. R. p. 219.)

Witness testifies that in 1906 work was confined solely to the tunnel. That the witness examined the work for 1906; that it will appear on page 218 of the printed record that counsel for defendant in error demanded the production of the books of the Ebner Gold Mining Company showing the amounts actually paid for assessment work.

Q.—I will ask you, Mr. Ebner, if you have any of the Ebner Gold Mining Company's books here by which you can refresh your memory and tell the exact amount that was paid for assessment work on these two claims, the Parish No. 1

and Parish No. 2, commencing with 1902 *up to and inclusive of the year* 1906*?*

A.—I can, yes sir, from the books here. (P. R. p. 218.)

Witness produces Journal and Ledger of the Ebner Gold Mining Company. Testifies that during the years from 1900 to 1908 he was President and Manager of said Ebner Gold Mining Company. (P. R. p. 218.)

That he had supervision over the keeping of the books himself; that a Mr. Denby kept part of the time but that Denby was not at present living in Alaska.

That the entries made in the Journal were taken from the pay rolls and the pay rolls were made up from the time books kept by the men doing the work. That the entries were then made from the Journal into the Ledger. (P. R. pp. 219-220.)

Witness says the time books are not in existence. That he has failed to find them. (P. R. p. 221.)

BY THE COURT:—You say you know nothing about where the original entry is?

A.—That is in the time books?

Q.—Yes?

A.—The original entries are all in these journals, but these entries were taken from the time books; that is, for instance, the time book pertaining to the labor,—the foreman had charge of the men; he knew where his men were

working every day; he had a certain department where he kept that himself; he made a certain notation on the time book where he was working and if he worked in the Parish, he would put a mark over that day and at the end of the month he would report and then the charge would be made. (P. R. pp. 221-222.)

Witness identifies page 99 of the Ledger, being plaintiff's Exhibit No. 8 at page 1869 of the record. (P. R. p. 223.)

Q.—And as I understand it, the entries in the Ledger show the pages that these entries are found in those two other books that you term your journals?

A.—Yes, sir..

Witness testifies that in the year 1907 Oscar Harri, watchman of the Ebner property, was directed to perform work on Parish No. 2 claim; that he turned the water in and worked in the Borean pit and other work; that towards the fall of that year a man by the name of John Sawney performed work and labor on said Parish No. 2 claim and Sawney was paid something like $66.00; that this work was done for the benefit of said Parish No. 2 claim and the amount paid for such work and labor was something over $100. (P. R. p. 225.)

Witness testifies that the nature of the work was to expose the rock in this Borean pit, etc. *"It was to get on to the bed rock and expose it and prospect it and determine as to the width of the vein there."*

That witness ascertained the number of days that Oscar Harri worked on the Parish No. 2 claim in 1908 and in order to make the work sufficient for that year, engaged John Perelle to go upon said claim and drive an open cut along the trend of the ledge and told him to take a man with him for that purpose; that for this work he paid Perelle $55; that the total amount paid for the work done upon Parish No. 2 claim in 1908 was $105.00 (P. R. pp. 226-227.)

That witness examined the work done each and every year and more particularly the work done and performed i n1907 on said Parish No. 2 claim. (P. R. p. 228.)

On cross-examination, witness was asked the following question:

Q.—The ditches were part of the work in the Borean pit?

A.—No, not in the Borean pit, no. (P. R. p. 237.)

Upon being requested to show where the ditches were on the Parish No. 2 claim, witness does so. (P. R. p. 237-238.)

That witness does not remember exactly how many feet was driven in the tunnel upon Parish No. 2 claim, but it was something over 20 feet. (P. R. p. 239.)

Upon redirect examination, witness testifies that he gave Mr. Tripp, who was representing parties having an option upon the mining property of

the Ebner Gold Mining Company, plaintiff in error herein, permission to go upon said property and develop the same and to do the assessment work thereon. (P. R. p. 245.)

On recross examination, the following question was asked the witness:

> *Q.—And tell me where these items came from that made up the* $1,053?
>
> *A.—The assessment work there was not carried on to the pay roll, as I testified here once before,—in other words, it was all charged to mining on the pay rolls.* (P. R. p. 315.)
>
> *Q.—So when the segregation was made, it was more or less of a guess?*
>
> *A.—No, it was made very carefully from the time book.* (P. R.. pp. 315-316.)

Witness testifies that he increased the number of stamps on the Ebner Gold Mining Company's property from 10 to 15, etc. (P. R. p. 318.)

JOHN PERELLE, a witness called on behalf of the plaintiff, testified substantially as follows:

That he follows the business of mining; that he has lived in Juneau for 19 years; that he acted as superintendent for the Ebner mines during the years 1900 and 1901; that he knows the Parish No. 2 lode mining claim; that during 1901 he had one man working upon Parish No. 2 claim for nearly two months steady, sometimes eight or ten men for several days. (P. R. pp. 285-286-287.)

That in 1908 witness and a man named Dominick Caesar performed 10 days' work each on said Parish No. 2 claim; that said work consisted of an open cut, stripping the surface and drilling some holes and blasting. (P. R. 287-288.)

DOMINICK CAESAR was called as witness on behalf of the plaintiff in error and testified substantially as follows:

That he, together with John Perelle, did and performed ten days' assessment work each for Mr. Ebner during the year 1908. That said work consisted of open cut and cutting square the surface; that he worked at the same place that John Perelle was working. (P. R. pp. 295-296.) That witness got $3.50 per day for said work. (P. R. p. 297.)

OSCAR HARRI, witness on behalf of the plaintiff in error, testified substantially as follows:

That he is a native of Finland. That he knows the Ebner mill on Gold Creek. That he was employed by the Ebner Gold Mining Company from 1903 up to and including 1908. (P. R. pp. 297-300.)

That he knows the Parish No. 2 lode; that he did assessment work upon said Parish No. 2 in 1907; said work consisting of a ditch from Snowslide Gulch and running water through said ditch and using said water for the purpose of sluicing off the dirt from the big pit—Borean pit. That this wor kwas done at Mr. Ebner's request for the purpose of uncovering the bed rock; that, in addition to this work, witness also, in 1907, cut the brush off the ground;

that someone else assisted the witness but witness forgets the name of the party so assisting; that he worked over 60 days by himself in performing work upon said Parish No. 2 claim, and Mr. Ebner had someone else assist him in addition to said 60 days which witnes worked alone. (P. R. pp. 298-299.)

That in 1908 witness did the same amount of work and spent about the same length of time, 60 days or a little over, upon said Parish No. 2 claim. (P. R. p. 300.)

That Perelle and Caesar worked upon Parish No. 2 in 1908. (P. R. p. 300.)

H. T. TRIPP, a witness on behalf of the plaintiff in error, testified substantially as follows:

That he has lived in Alaska since 1897; that his business is mining;that he has managed and superintended mines; that had control of the work of the Ebner group of mines in the year 1909. (P. R. pp. 321-322.)

That in 1908 in company with Mr. Ebner, Wetrick and others, brushed out the common side line of the Lotta and Parish No. 2. (P. R. pp. 322-323-325.)

That he did considerable surveying, topographical surveying, assaying etc., at different points upon the Ebner mining property, including the Parish lode claim. (P. R. pp. 328-329.)
(P. R. pp. 328-329.)

That the purpose of said work was to locate a tunnel for the benefit of the Ebner group of min-

ing claims, including the Parish No. 2 (P. R. pp. 333-334.)

Witness further testifies that the present tunnel on the Cape Horn lode mining claim (a short distance below Parish No. 2 side line) was the place or nearly the place where he had determined to drive a tunnel for the purpose of developing and opening up the entire group of lode mining claims, included within which is the Parish No. 2. (P. R. pp 347 and 351.)

That said tunnel he proposed would run along the same general line as the tunnel now being driven. (P. R. p. 351.)

F. J. WETTRICK, U. S. Deputy Surveyor, testified, with regard to amount of work shown in his surveys on the Parish No. 2 claim, as follows:

That the total value for the tunnels is $960.00 and the open cut work $100.00, making $1096.00 for the tunnels and open cut; that he took only that work that was plainl yvisible upon the claim, and that was all that was mentioned in his returns except the road that was built. That there were two tunnels upon the Parish No. 2 claim, each with a length of 32 feet and the upper tunnel was driven in 1910; that there is also an open cut 19 feet long. (P. R. pp. 606-607.)

* * * * * *"I did not list in my returns as improvements, development work, because I saw that I had enough actual work done by tunnel work and open cut work, so that I did not have to hunt up and measure up the Borean placer pit and the smaller coverings of the veins over the claim; just plainly*

visible and easily determined work that was done upon the claim." (P. R. p. 638.)

Witness further testifies that he had a conversation with Mr. Mackay, superintendent for the plaintiff company, and recommended that it would be better to have some more tunnel work done because of the fact that some of the other work had caved in, as is the habit there, and would not show up plain enough and that he wanted to be sure that there was enough visible and permanent work, etc. (P. R. p. 641.)

We have, therefore, conclusively established the Parish No. 2 mining claim upon the ground and shown absolutely by uncontradicted evidence the validity of said claim so far as the staking, marking of the boundaries and discovery is concerned; and have, from the foregoing evidence, conclusively established beyond any doubt, and absolutely without contradiction, the annual expenditure of $100 each and every year from 1900 to and including the year 1908 for work and labor actually done and performed upon the claim itself within the time required by law in each of the years aforesaid.

> "The question of 'benefit to the claim' can only arise when the work itself was done on some claim and it is sought to utilize it for the benefit of another claim held by the same party or where it is outside of the claim proper in the shape of road building, ditch, etc." (Mor. Mining Rights, 14 Ed., 120.

"It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count." (Wailes vs. Davies, 158 Fed., 667.)

"If work is actually done within the limits of the claim in good faith for the purpose of developing it, strict compliance with the requisite of the statute is established, and a court will not attempt to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner." Lindley on Mines, 2d Ed. Sec. 629, p. 1162 and cases cited.

All the evidence on behalf of the defendant in error to contradict the positive testimony of the witnesses of the plaintiff in error as to work and labor done upon said Parish No. 2 lode claim and the actual amount paid therefor, as hereinbefore stated, was for the purpose of showing, or attempting to show, that such work and labor did not benefit the claim and visible evidence of the same was not shown fully upon said claim. And all of this testimony of the defendant in error was for the purpose, evidently, of forfeiting the rights of the owner in and to the said Parish No. 2 claim and to establish the validity of the Canyon and Oregon claims. However, the two last named claims were declared invalid and void locations; consequently, the effect of the trial judge's finding in this regard would be

to forfeit absolutely to the Government the ground embraced within the Parish No. 2 lode mining claim —that is to say, turn it over to the public domain. The Government is not a party to the suit—it is not seeking to declare the Parish No. 2 mining claim public domain and that the expenditure of at least $100 each and every year upon said claim as mineral ground by the owner is money thrown away and that such owner shall lose his rights.

We cannot refrain from stating that such a finding is tantamount to making the Government a silent party to the suit merely for the purpose of declaring the ground public domain so as to establish the easement over the same, which the defendant in error is seeking to obtain. And this forfeiture is not pleaded until all the evidence has been submitted and the plaintiff in error and defendant in error rested their respective sides of the case.

> "Forfeitures are deemed odious in the law, and the evidence to sustain them must be clear and convincing. Every reasonable doubt will be resolved in favor of the validity of a mining claim, in opposition to a forfeiture." (Loeser vs. Gardner, et al, 1 Alaska Rep., 641; Wulff vs. Manuel, 23 Pac. 723; Mattingly vs. Lewisohn, 35 Pac,. 111.)
>
> "A mining location will not be declared forfeited on mere suspicion. The evidence upon which to base a forfeiture must be clear and convincing." (Thomson, et al, vs. Allen, et al,

I Alaska, Rep., 636; See also Prov. Gold. Min. Co. vs. Burke, 57 Pac., 641; Ames vs. Kruzner, et al, 1 Alaska Rep., 598; McCullouch vs. Murphy, et al, 125 Fed., 147; Whalen Consol. Cop. Min. Co., vs. Whalen, et al, 127 Fed., 611; Hammer vs. Garfield Min., Etc., Co., 130, U. S., 291; Lockhart vs. Johnson, 181, U. S., 516.

"The law does not favor forfeitures. It is true that it has been held, in cases where it has been sought to establish a relocation of a mining claim, that the bona fides of the prior locator might be taken into consideration in determining whether he had done the necessary assessment work to retain his claim. But this was held on the ground that courts are reluctant to enforce a forfeiture and will not do so, except upon clear and convincing proof of the failure of the former owner to perform the amount of labor required by law." (McKay vs. Neussler, 148 Fed., 87.)

"The statute does not require any particular character of labor; it does not require that the work shall be wisely and judiciously done nor does it say how the work shall be performed." (Wailes vs. Davies, 158 Fed., 667.)

"Any work done for the purpose of discovering minerals is improvements within the spirit of the statute." (Mor. Min. Rights, 14 Ed. 117, citing U. S. vs., Iron-Silver Co., 24 Fed. 568.)

"Flumes, drains or the turning of a stream * * * * * will count." (Mor. Min. Rights,

14 Ed., 117, citing St. Louis Co. vs. Kemp, 104 U. S., 636.)

Any resumption of work upon the Parish No. 2 lode mining claim during any of the years since its location up to the year 1907 would have been sufficient to have held the claim under the law, provided there was no intervening location of a mining claim covering the same ground prior to such resumption and continuation of the work until completed. (See Thatcher vs. Brown, 190 Fed., 709.)

However, in 1907 Congress passed an Act, applicable only to Alaska, by which a forfeiture was declared on failure to do assessment work on mining claims within the year, and in Thatcher vs. Brown, supra, a resumption of the work following year where there was a failure to do work will not save the claim from forfeiture.

It requires two parties to make a forfeiture absolute: First, the party who abandons, and second, the party who relocates. The second party therefore must take advantage of the first party's default before such default can enure to the second party's benefit. Morrison Min. Rights, 14th Ed.; Little Gunnell Co. vs. Kimber, 1, M. R., 536; Beals vs. Cone, 62 Pac., 948; Madison vs. Octave Oil Co., 99 Pac. 176.

Whether a failure to do assessment work within the year is absolutely *ipso facto*, such a forfeiture that would defeat the owner even though he was several years thereafter kept up his assessment work, and no intervening right had interposed during said

years, is not, in our opinion, a question to be considered in this case for the reason that the evidence conclusively shows that the years 1907 and 1908, when such forfeiture might occur by reason of a failure to do and perform the work within such years, stand out prominently as two years when the amount of annual labor done upon the Parish No. 2 lode mining claim within each of said years far excelled that of other years, even including 1909, the year when the Trial Court holds the annual work to have been done and performed.

In proof of this, we call special attention to the record. As already shown herein, Oscar Harri spent over 60 days upon the Parish No. 2 lode claim doing and performing work and labor thereon during the year 1907; that in addition thereto, man by the name of John Sawney was paid the sum of $66.00 for assessment work actually done and performed by him directly *upon said Parish No. 2 claim* during said year of 1907. (P. R. pp. 225, 298 and 299.)

In 1908, the same amount of work was done and performed by Oscar Harri, and the same number of days, viz: 60 days, *upon said Parish No. 2 lode mining claim;* that in addition thereto, John Perelle and Dominick Caesar each performed 10 days' work *directly upon said Parish No. 2 lode claim* during said year of 1908. (P. R. pp. 226, 287, 288, 296, 297 and 300.)

Oscar Harri was watchman upon said mining proerty of the Ebner Gold Mining Company, including the Parish No. 2 mining claim, and was in charge

and constantly upon said mining property, as such watchman. The services of watchman, however, are not included in any of the work described as assessment work. (P. R. pp. 275 and 276.)

It will further appear from the testimony hereinbefore quoted that $3.50 per day were the going wages for doing and performing assessment work in Southeastern Alaska during said years.

It will appear from the record that the annual assessment work on the Parish No. 2 claim in 1909, the year the Trial Court holds the assessment work to have been done, was 51 days' labor done upon said claim, which consisted in digging roads, chopping trails and crossing and recrossing over the great thickest of brush and building a dam to turn the water through a ditch to run down onto said Parish No. 2 claim. (P. R. pp. 336-8.)

We consider, and the evidence clearly supports us, that the finding of the Trial Court that the annual labor upon said Parish No. 2 claim *was not done in* 1907 *and* 1908 and *was done in* 1909 is arbitrary, inconsistent and unreasonable, and unsupported by any evidence whatsover in this case.

As a corollary, if the work was done in 1909 there can be no question or reasonable dispute but that the work was certainly done in the years 1907 and 1908.

There is no question involved in this writ of error of a relocation of a valid subsisting mining claim covering the ground embraced within the Parish No. 2 claim by reason of forfeiture owing to a

failure of the owner of said Parish No. 2 claim to do the annual labor thereon. There is absolutely no question of conflicting ownership to the ground embraced in said Parish No. 2 claim between the parties to this action to be considered by the Appellate Court, for the Trial Court has determined and found that the defendant in error has no title to any mining claim conflicting with the Parish No. 2, and no writ of error is presented from such finding and decision.

Absolutely disregarding the allegations of the pleadings by which the plaintiff in error and defendant in error are claiming the ground in dispute as mining claims, and the testimony of all the witness that said ground is mineral, each side claiming discovery, the Trial Court determines that neither party has a discovery; that the ground is non-mineral; and that plaintiff in error forfeited its mining claim by failure to do the annual labor; and segregates from a well known group of mining claims in Silver Bow Basin, nearly all of which are patented and some of which have produced ore that has been mined and milled at a profit, and considered to be the greatest lode belt in the Territory of Alaska. And what is the result of such a decision? Simply to relinquish the U. S. public domain ground which has absolutely no other value than as mineral ground.

IV.

The Court further erred in making the following Finding No. 8, in which the Court finds in substance:

That under the custom of miners in Harris Mining District, being the district in which Parish No. 2 mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by others * * * * *.

And also Finding No. 2 in which the Court finds substantially:

That under the customs of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendane went upon Parish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running a stamp mill, etc.

As already argued in this brief, we cannot conceive how the question of appropriation of water and the easement by flume line across the Parish No. 2 claim can be considered. However, from the findings of the lower Court, holding in effect that under the customs of miners generally observed by the miners of the Harris and surrounding mining districts, that the appropriator of water has uniformly exercised the right to build ditches and conals across unpatented mining claims, etc., it probably revolves upon us the necessity of making reference and to some extent quoting substantially the evidence contained in the record upon which such finding is based.

The defendant in error called quite a number of witnesses to show that, under the customs of

miners in the Harris Mining District, appropriators of water have the right to cross unpatented mining claims which had been taken up and segregated from the public domain prior to any diversion or appropriation of water.

BENJAMIN BULLARD, the first witness called in this connection, testified substantially as follows:

That he has resided in Juneau about ten years and that his business during such time has been mining.

Witness pretends to state how appropriation of water may be made under the customs of miners. (P. R. p. 1075.)

Witness further states that, under the customs of miners, an appropriator of water has the right to cross over unpatented mining property. (P. R. pp. 1077-1078.)

Upon cross-examination this witness says that he has no personal knowledge of a single instance in Southeastern Alaska where a ditch crossed over an unpatented mining claim without the consent of the owner of said claim. Witness admits absolutely that he has had no personal experience concerning the matter and all that he testifies to is from hearsay. (P. R. pp. 1079-1080.)

GEORGE HARTRADER, the second witness called by defendant in error upon this point, testified substantially as follows:

That he has lived in Juneau thirty years; that

he is known as the builder of the original Hartrader ditch is known as the Hartrader Ditch or the Coombs & Campbell Ditch. (P. R. p. 1083.)

Witness states that he knows to some extent the customs of miners with reference to the appropriation of water and the acquisition of water rights in the Harris Mining District and surrounding districts. This witness further states that under such customs a man who owns the banks of a stream would have a perfect right to use the water in the stream. (P. R. p. 1084.)

Witness then states what is necessary with reference to the appropriation of water. (P. R. p. 1084.)

Q.—What rights under the customs of miners in this locality has one seeking to acquire a water right by diversion and application to a beneficial use to build ditches, flumes, canals, aqueducts, and intakes on the mining claims, whether quartz or placer, necessary for him to cross in order to divert the water and apply it to the beneficial use desired?

A.—The way we done in the early days in the Basin, we crossed over that man's claim with our water ditches and flume. (P. R. p. 1085.

Witness states that he could not give the names of more than one company over whose ground he crossed with the ditch line. (P. R. p. 1086.) Witness also mentions the ground of two or three individuals over which the ditch crossed. (P. R. pp. 1086-1087.)

On cross-examination witness testified that the ditch he had reference to was dug for the purpose of conveying the water to placer mines (P. R. pp. 1087-1088); *that the ditch right was the oldest right on the creek, but he couldn't say whether the ditch was taken up before the claims over which the ditch crossed or not.* (P. R. p. 1088.)

That at that time there was no quartz mills in and about Juneau and there were no other ditches of any consequence in Southeastern Alaska at that time. (P. R. pp. 1088-1089.)

That since that time there have been a number of quartz mills built and witness does not know anything about the custom that has prevailed with those companies in crossing lands owned by others. (P. R. p. 1089.)

Witness testifies to a miners' meeting in the early days and the passing of by-laws, rules, and regulations (P. R. p. 1089); that there was nothing said in the by-laws and regulations about the right to cross anybody's land to witness' knowledge. (P. R. p. 1090.)

That the only case he knows of is the Hartrader ditch which he built, as testified to. (P. R. p. 1090.)

CHARLES BOYLE, the third witness called by defendant in error to prove the miners' customs, etc., testified:

That he has resided in Juneau since 1886 and has followed the business of mining ever since coming to Juneau. (P. R. p. 1091.)

This witness also attempts to state how water is appropriated, etc., under the customs of miners. (P. R. p. 1091.)

That it has always been the custom to convey water across another man's ground. (P. R. p. 1092.)

Q.—Could the man who owned the ground stop you from doing that, under the custom?

A.—Not as I know of. I think it was customary always. (P. R. p. 1092.)

Witness further states that he knows the Hartrader ditch and also knows that that ditch crosses the ground owned by Luke Nolan and his partner and also of six or seven claims. (P. R. p. 1093.)

Witness believes that some of the mining claims were located before the ditch was built. (P. R. p. 2094.)

On cross examination witness states that he never knew of a man going on a claim owned by another and taking the water from the creek which such claim crossed in Alaska. (P. R. pp. 1095-1096.)

That he has known of a man going on public domain appropriating water and conveying it by ditch over the claim of others. (P. R. p. 1096.)

Witness further testified that there were three or four partners connected with the Hartrader ditch; that Coombs was one of the partners; that this ditch crossed over Coombs' quartz claim.

Testifying as to the Coombs & Hartrader ditch, the following testimony appears in the record, viz:

Q.—Hartrader & Coombs took the water down to work on the placer claims?

A.—Yes, sir.

Q.—What did you say the other ditch is that you knew up there in early days?

A.—The first ditch was—there were three or four partners in it—Coombs was in it and Hartrader, too. (P. R. p. 1097.)

Q.—What creek did they take the water from?

A.—The lower ditch was taken out of Icy Gulch. (P. R. p. 1097.)

Q.—Where is that gulch up there with respect to the Perseverance or the Alaska-Juneau property?

A.—It comes right straight down from the mountain—the Alaska-Juneau runs right up against it. (P. R. p. 1097.)

Q.—That is where those people took it?

A.—Yes. (P. R. p. 1097.)

Q.—They went way up on the hillside and took up the water and then took a ditch around and across some other people's property?

A.—Yes, sir. (P. R. p. 1097.)

Q.—They went on Government land and took the water too—went way up and got it on land nobody owned?

A.—Of course, nobody owned it at that time. (P. R. p. 1908.)

On page 1099 this witness testifies that before crossing over any one's land with a ditch, that the

consent of the owners of said land was first obtained. (P. R. p. 1099.)

That the only thing witness knows about the custom is the custom which prevailed in the early days when there was placer mining going on. (P. R. p. 1099.)

HUGH TRACY, the fourth witness called on behalf of defendant in error to testify with reference to the miners' customs, stated:

That he has lived in Douglas, Alaska, about twenty-five years and his business has been prospecting and mining ever since. (P. R. pp. 1100-1101.)

This witness also attempts to testify with reference to the customs of miners and says that he thinks under the custom they had a right to cross over ground owned by others for the purpose of conveying said water. (P. R. p. 1102.)

That he worked on the Campbell & Coombs ditch. (P. R. p. 1102.)

On cross examination this witness testified that the only ditch he knows anything at all about in the Silver Bow Basin is the Hartrader. Cooms & Campbell ditch. (P. R. p. 1103.)

Q.—Do you know anybody's mining claims that the ditch crosses?

A.—Yes, my own. (P. R. p. 1104.)

Q.—When did you locate your claim?

A.—Four or five years ago. (P. R. p. 1104.)

Q.—The ditch was there when you located the claim?

A.—Yes. (P. R. p. 1105.)

Q.—Who else owns any claim there that they cross?

A.—I don't know. (P. R. p. 1105.)

Q.—And it is from this knowledge that you have that you testify to the general custom that Mr. Hellenthal has questioned you about?

A.—That is all. (P. R. p. 1105.)

VICTOR LUNDQUIST, the fifth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has resided in Juneau since 1887 and worked in mines; that he has never helped to build anw ditches; that he does not know the customs of miners. (P. R. p. 1105.)

In answer to a question as to what right any one had to build ditches and canals across mining claims under the customs of miners, witness answered as follows:

A.—They have a right providing he gets the right from the man who has a right to the water first—he has to get permission from him to get the water out of the creek and build a flume and get the water. That is the way I understand it.

Q.—If a man is trying to get water from the creek to the water right and there is a mining claim between him and the creek, has he

the right to cross that with his ditch under the custom of miners as you understand it?

A.—I don't know anything about that. (P. R. p. 1106.)

CHARLES MORSE, the sixth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1882 and has been mining more or less since he came to Juneau. (P. R. p. 1106.)

Witness says that in Montana and other places they have crossed different claims with ditches. (P. R. p. 1107.)

On cross examination witness says that he never operated any mines in Silver Bow Basin and never ran any ditches across anybody's land in Alaska. (P. R. p. 1108.)

That the only ditches he knows about are the Hartrader ditches. (P. R. p. 1108.)

That he does not know any more about that than they have told him. (P. R. p. 1109.)

That he attended a miners' meeting in the early days; that there has been no miners' meetings for fifteen or twenty years and not since the Courts were established in Alaska. (P. R. p. 1109.)

THOMAS WILSON, the seventh witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Alaska since 1884. That he has mined about forty years. (P. R. p. 1110.)

Q.—Do you know the custom of miners in the mining district surrounding Juneau and the Juneau gold belt?

A.—I never seen any in Juneau to know anything about them. (P. R. p. 1110.)

On cross examination witness states that he came here (Juneau) in 1884. (P. R. p. 1110.)

That he knows that prior to his coming here there was an organization of what is called the Harris Mining District. (P. R. p. 1111.)

That he never attended any meeting of the miners in the early days; that they held one meeting in 1885; that it was a rough affair and witness went away; that there has been no attempt since that time to hold a meeting of the miners; that there has never been any attempt to live up to those miners' rules and regulations since 1885. (P. R. p. 1111.)

DAN KENNEDY, the eighth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1881 and followed mining the first two years, viz: 1881 and 1882. (P. R. p. 1112.)

This witness states that before crossing mining claims of others you had to ask them for the privilege under the miners' rules. (P. R. p. 1113.)

Q.—How was it since?

A.—There was nothing about it since that I know of. It appeared there was nobody want-

ed the water but what was using it. (P. R. p. 1113.)

Q.—Who had the right to take up water?

A.—Anybody had the right to take up water where it was Government land. (P. R. p. 1113.)

CHARLES HOUSER, the ninth witness called on behalf of defendant in error with reference to the customs of miners, testified:

Tht he came to Juneau in 1886 and has followed mining and prospecting mostly since that time. That he does not know anything about the customs of miners in the Harris Mining District and other mining districts adjoining the Harris Mining District. (P. R. p. 1114.)

CHARLES MALLOY, the tenth witness called on behalf of defendant in error with reference to the customs of miners, testified that he knew nothing about the matter. (P. R. pp. 1114-1115.)

I. N. MOORE, the eleventh witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1886 and has followed the business of mining and boating. (P. R. p. 1117.)

That he does not know definitely the customs or practice. (P. R. p. 1118.)

This witness states that he only has a supposition and that is that a man can go on the United States Government's land and locate the water, but that he could not go upon a claim located by another

for the purpose of taking such water. (P. R. pp. 1119-1120.)

M. S. HUDSON, the twelfth witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has lived in Southeastern Alaska eighteen years. That up to the last three years he has followed mining. (P. R. p. 1155.)

That he has worked properties as owner and as superintendent of the Nevada Creek property, located on Nevada Creek (Douglas Island, Alaska) (P. R. p. 1156.)

This witness also attempts to give the customs of the miners with reference to appropriation of water. (P. R. p. 1156.)

With reference to crossing mining claims of others, this witness testified:

> *A.—As a rule, where it is necessary to cross their claims, as we have done down there, we got across wherever it is the most convenient place to get the water, because a good many times you can't always take it out of the creek—you have to take it on the sidehill to get a fall to it—you usually take the most convenient point to get it out of the creek.* (P. R. p. 1157.)
>
> *Q.—It makes no difference whether one happens to be on another man's mining claim or not, in using it?*
>
> *A.—Never made any difference to us around there in using it.* (P. R. p. 1158.)

Witness testifies that he has taken the water out of Nevada Creek across what is known as the Corbus claims, which are quartz claims, belonging to J. P. Corbus and Mr. Mills; that he did not ask Corbus' consent or permission to cross it and nobody interfered with his crossing said claims;that this was fourteen or fifteen years ago. (P. R. p. 1158.)

That they dug a ditch across the Spread Eagle claim, owned by a man named Cleever, which was built six or seven years ago. (P. R. p. 1159.)

Witness does not know whether or not Cleever's permission was ever asked to build said ditch. (P. R. p. 1159.)

On cross examination witness testified:

Q.—In bringing that water down you crossed some claims belonging to J. P. Corbus, who used to be superintendent of the Alaska-Treadwell Company?

A.—Yes, sir. (P. R. p. 1161.)

Q.—How many claims did he own?

A.—He owned two claims and two fractions. (P. R. p. 1161.)

* * * * *

Q.—That group of claims now belongs to the Alaska - Treasure — those two Corbus claims?

A.—Yes. (P. R. p. 1161.)

Witness says he does not know what arrangements were made with Corbus to go across said claims. (P. R. p. 1162.)

He further states that he does not know when the water was located; does not know whether or not the water was located before or after the mining claims were located or not. (P. R. p. 1152.)

That he was the superintendent of the Alaska-Treasure group of claims for about six years and that the Corbus claims now belong to the Alaska-Treasure. (P. R. pp. 1161-1162.)

That Cleever never made any objection to witness taking water off his claim; that Cleever had never used it; that Cleever died a few days ago. (P. R. p. 1164.)

R. A. KINZIE, the thirteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he is superintendant of the defendant in error. (P. R. p. 1167.)

That he knows the customs of the miners in the Harris Mining District and surrounding mining districts. (P. R. p. 1170.)

He attempts to state how appropriation of water is made under the miners' customs. (P. R. pp. 1171-1172.)

Witness testifies the custom is to extend ditches over property belonging to others, the only restriction being that you cannot interfere with a man's working or cause him damage. (P. R. p. 1173.)

That an owner of a ditch has a right to cross over a mine that is located before the ditch, but a ditch owner has to take care of the property. (P. R. p. 1173.)

Witness testifies to a ditch constructed across a claim of Captain John Johnson without his permission. (P. R. pp. 1181-1182.)

Witness also testifies of ditches and flumes crossing over the Bear's Nest ground and part of the Jersey City, but that the water is taken from the public domain. (P. R. p. 1183.)

Also, the ditch and flume line crossing over the ground of Dolan at Sheep Creek. (P. R. p. 1185.)

Further, of a ditch that starts on the property of the Yakima Gold Mining Company. (P. R. p. 1185.)

That no consent was obtained to cross over such property. (P. R. p. 1186.)

Also, a ditch at Berner's Bay crossing over other property. (P. R. p. 1186.)

That the intake of such ditch is on the property of some one other than the Berner's Bay Company. (P. R. p. 1187.)

On cross examination witness testifies that the main Treadwell ditch was here when he came. (P. R. p. 1190.)

That he does not know whether Captain Johnson owns the mining claim or not, that he was simply told that he did; that the assessment work on the Johnson claim has not been done during the last few years and that it is now an abandoned property. (P. R. p. 1191.)

That he does not know who owns the Yakima porperty. (P. R. p. 1192.)

That the big Treadwell ditch that traverses the mountain side was constructed long before the witness came to Alaska, and the extensions were either over Government land or ground belonging to the company. (P. R. p. 1194.)

That the ditch crossing what is known as the Shattuck property was over that property before the witness came to Alaska. (P. R. p. 1195.)

That the ditch was over the Bear's Nest property before the witness came to Alaska; that the water rights in Sheep Creek are in litigation. (P. R. pp. 1196-1197.)

That the Ready Bullion Creek is one of the oldest locations on the Island and was in operation when the witness came to Alaska, and he does not know individually or personally by what right or agreement permission was given to convey water across such claims. (P. R. pp. 1198-1199.)

THOMAS McCONNEY, the fourteenth witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has resided in Juneau since 1885 and has followed mining and prospecting. (P. R. p. 1209.)

This witness has never owned any ditch or flume line, but has helped to build them. (P. R. p. 1210.)

> *Q.—What flumes did you help to build?*
> *A.—I helped to build, not a flume, but a ditch, in the Silver Bow Basin—* * * * * *
> *—it was sometimes called the Hartrader*

ditch and sometimes the Bulger. (P. R. p. 1211.)

Witness does not know what arrangements, if any, were made with reference to crossing anybody's property. (P. R. p. 1211.)

This is the only experience he has had with reference to ditches in Alaska.

GEORGE MILLER, the fifteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has resided in Juneau twenty-four years and had been engaged in the mining business, both quartz and placer mining. (P. R. p. 1211.)

Witness testifies that appropriator of water just crosses ground so long as no interference with the claim. (P. R. p. 1212.)

That he has built ditches across placer and bench claims. (P. R. p. 1213.)

That he has taken water off the claim of Maloney & Dalton. (P. R. p. 1213.)

On cross examination this witness states that all this was done on Porcupine Creek (about 100 miles from Juneau) (P. R. p. 1213.)

That there was a mutual understanding among the people in Porcupine; that he knows nothing about ditches up in Silver Bow Basin; that the ditch in Porcupine is the only experience he has had. (P. R. p. 1214.)

PERRY WELLS, the sixteenth witness called

on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Juneau since 1896. His only experience with ditches was one ditch in Porcupine and they "spoke to the boys about it and went through with it." (P. R. p. 1216.)

That the ditch that he has reference to took the water off Government land and they never obtained any permission to cross other claims excepting more than spoke to them about it. (P. R. p. 1216.)

JOHN KOCKHART, the seventeenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Alaska eight years and has followed mining. (P. R. p. 1218.)

That he is not well acquainted with the miners' rules; that he does not know whether it would make any difference in taking the water off a mining claim or whether you crossed a mining claim, etc. (P. R. p. 1219.)

On cross examination this witness testified in answer to the following questions as follows:

Q.—You used to work up here with the Jualpa Company?

A.—Yes, sir. (P. R. p. 1220.)

Q.—Do you know how the Jualpa Company got is water right up there from Ebner?

A.—I think it paid for it. (P. R. p. 1220.)

Witness states that he knows of no other in-

stance in this country concerning water rights excepting the Jualpa. (P. R. p. 1220.)

———— HOWELL, the eighteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Juneau about ten years and has followed mining. (P. R. p. 1222.)

Witness states that he understands that a man can take up water and cross any claim as long as he doesn't do any damage, or if he does that he pays the damage. (P. R. p. 1222.)

On cross examination this witness says he has never operated any mines in Southeastern Alaska and the only thing he knows about this custom is what he has heard the people testifying say. (P. R. p. 1224.)

We deemed it unnecessary to introduce any testimony to establish the non-existence of miners' customs with reference to the foregoing, for all of the evidence in this regard submitted by the defendant in error clearly shows that no custom such as they endeavor to show exists in Southeastern Alaska.

However, the plaintiff in error asked William M. Ebner, one of its witnesses, two or three questions concerning the miners' custom referred to, and said witness positively states that no such custom prevails in Southeastern Alaska and further that he does not know of a single instance where one party desiring to cross the property of another did it with-

out the consent of the party owning the property. (P. R. p. 1293.)

There is no provision in the minutes and by-laws of the miners which provides for the crossing, by ditch or flume line, over the mining property of others. (P. R. pp. 1800-1805 inclusive.)

The evidence clearly shows that there has not been a meeting of miners of the Harris Mining District since the year 1885. In this connection, we refer the Court to the testimony of John G. Heid, a witness on behalf of plaintiff in error, and who was elected Mining Recorder of the Harris Mining District back in the eighties, to the effect that he turned over the records of the Harris Mining District to the United States Commissioner, who was designated as the proper recorder of the recording district by Judge Dawson, Federal Judge for the District of Alaska, in 1886. We quote the following answer from the record:

> *A.—The statute provides that the Court has authority, in fact, directs the Court to establish recording districts and designating the Commissioners as recorders, and it was under that organic act that Dawson made that ruling, and I delivered over the records to the Commissioner at that time, to Judge Williams, the Commissioner.* (P. R. pp. 1259-1260.)

We hardly believe it necessary to cite any authorities concerning customs of miners and their effect upon, or the consideration to be given thereto in con-

nection with, the Federal Statutes. However, in the case of Meng vs. Coffee (93 N. W. Rep., pp. 719-720) it is stated:

> *"The customs in the States to which Congress had reference were widespread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and, as the testimony shows, often disputed."*

We submit that all the testimony in this case shows it has always been the understanding of the witnesses testifying, that before a subsequent appropriator of water could cross over mining claims located prior to such appropriation of water, the consent of the owner of such mining claims must be first had and obtained, or at least such silence on the part of the owner of said mining claims as to amount to acquiescence.

Therefore, the attempt of defendant in error to establish a miners' custom whereby subsequent appropriators of water could cross over unpatented mining claims, etc., having so completely failed, we would ask under what law or right the crossing by defendant in error's flume line over the mining claim of plaintiff in error can be maintained?

An Act of Congress passed in 1866 (Rev. Stat., Sec. 2339), with reference to rights of way for ditches, etc., provides:

> *"And be it further enacted, that whenever, by priority of possession, rights to the use of wa-*

ter for mining, agricultural, manufacturing and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damages."

The mining laws of the United States were made applicable to the District of Alaska in the year 1884 and consequently the Act above applies to Alaska.

"Rights held and sanctioned by general laws could not be divested by mere local rules and neighborhood customs." (Lindley on Mines, Vol. 1, p. 481, Second Ed.—citing: Waring vs. Crow, 11 Cal. 367; Dutch Flat W. Co. vs. Mooney, 12 Cal. 234.)

"The right of the United States to grant easements and other limited rights on any portion of its public domain cannot be gainsaid, and subsequent purchasers must take it burdened with such easements or other rights.

"But when it has once disposed of its entire estate in the lands to one party, *it can afterwards no more burden it with other rights than any other proprietor of lands.*"

"*The same doctrine applies to perfected mining locations.* After such location has once been completed, the estate of its owner cannot be subjected to burdens, except for some public use; or if sanctioned by the State Constitution, perhaps, for a private use, upon condemnation proceedings."

(Lindley on Mines, Vol. 1, Second Ed., Sec. 531, pp. 880-881.)

In the case at bar it will be borne in mind that the defendant in error entered upon the land of plaintiff in error and diverted the water therefrom and constructed a dam and flume line thereover for the purpose of conveying such water to some point for contemplated use.

In the case of McGuire vs. Brown (39 Pac., p. 1062) there is an extensive opinion covering the points herein involved and citing numerous authorities in support of such opinion. See also Stur vs. Beck (133 U. S. 547.)

So the only right given to cross, by a ditch, flume or pipe line, over mining claims in Alaska is that provided in the Federal Statute hereinbefore referred to, excepting, only, the exercise of the right of eminent domain provided for in the Alaska Civil Code, Sec. 210. This right of eminent domain can only be exercised in behalf of a public use author-

ized by law; and in the taking of property necessary to such public use, the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use and the necessity of the purpose for such use.

Miocene Ditch co. vs. Ling, 138 Fed., p. 544.

This case presents no such situation. The water is not to be used for a public use, but, on the contrary, is to be taken from its natural channel and conveyed a distance of over a mile, for the purpose of conducting a private enterprise, viz: a stamp mill to treat the ores of the defendant in error.

There is no question in this case as to any consent being given to cross over the mining claims of plaintiff in error. In fact, as shown herein and as wil appear by the record, every possible effort was made to prevent such crossing—even to the extent of the agents and representatives of the plaintiff in error being arrested by reason of its endeavor to prevent such forced invasion of what is considered to be is legal rights.

Where a ditch is to be built across claims or lands whose owners refuse consent, condemnation proceedings are necessary under the Eminent Domain Acts, notwithstanding the right of way granted ditches by the Act of 1866.

Morrison's Mining Rights, 14th Ed., p. 230.

In the case of Vandyke vs. Midnight Sun Mining and Ditch Co. (177 Fed., p. 86), the evidence was conflicting as to whether, at the time of the con-

struction of the ditch, the plaintiffs in error objected thereto. However, the use in that case was a public one and the defendant in error thereafter brought suit to condemn a right of way over the mining claims of the plaintiff in error. But, as stated, in the case at bar there is no public use or question of eminent domain involved.

All the foregoing evidence with reference to the appropriation and acquisition of water and water rights, and the conveying of such water by flume, pipe or ditch line across the mining claims of others to the place of use or intended use thereof; and all the evidence and testimony to establish a custom among miners in Southeastern Alaska with reference to crossing over mining claims located prior to the diversion and appropriation of water,—was introduced and admitted over the objections of plaintiff in error, and to which admission of such testimony and evidence the plaintiff in error duly excepted. (P. R. 1073.)

V.

POSSESSION AND OUSTER SUFFICIENT UPON WHICH TO MAINTAIN ACTION OF EJECTMENT BY PLAINTIFF IN ERROR IN THIS CASE.

We have already shown in this brief that the evidence clearly establishes that the plaintiff in error was ousted of its possession of the Parish No. 2 mining claim. It will further appear from the rec-

ord that an action was brought by the plaintiff in error against the defendant in error to restrain said defendant in error, its agents, servants and employees from constructing a flume over and across said Parish No. 2 claim, and the opinion of the Trial Court upon the preliminary hearing and while the flume was being built, and before the same had crossed the Parish No. 2 claim, as well as the opinion of the said court upon the final hearing, shows a complete ouster of plaintiff in error from its possession of said Parish No. 2 and the Lotta mining claims by the defendant in error.

In the opinion above referred to, the Trial Court states substantially:

> That if the defendant does not succeed in showing its title at the final hearing that it is assuming more responsibility in constructing the flume over and across the Parish No. 2 claim than the plaintiff;

clearly intimating that in an action of ejectment, if the defendant does not succeed in proving its title to the ground over which the flume was then being built, it will be compelled to vacate said property from which it had ousted the plaintiff. In fact, the plaintiff in error held its possession so vigorously that, as already stated herein, and as appears from the printed record in this case, the employees of the plaintiff in error were arrested at the instigation of the defendant in error in order that the defendant in error might complete its flume and dam on the Parish

No. 2 and Lotta mining claims. We state this merely for the purpose of showing a complete ouster.

This possession by plaintiff of the Parish No. 2 mining claim of which it was ousted by one not having any title thereto is of itself sufficient to maintain an action in ejectment and to be restored to such possession.

> "When neither party has a valid location possession is good title in the claimant."
>
> *Mor. Min. Rights*, 14 *Ed.*, 403 *citing*: *Protective Co. vs. Forrest City Co.*, 99 Pac. 103.
>
> "* * * the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him."
>
> *Lindley on Mines*, *Vol.* 1, *p.* 370, *Sec.* 216.

In support of the foregoing, Mr. Lindley quotes the foregoing from a California case, viz:

> "As against a mere trespasser, one in possession of a portion of the public land will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone."
>
> "A forcible and tortious invasion of such possession confers no privilege upon the invader,

and cannot be made the basis of a possessory title. A rightful seizen cannot flow from a wrongful disseizen."

Lindley on Mines, Vol 1, *p.* 371, *Sec.* 217.

"Possession of land by a plaintiff in trespass *quare clausum fregit* is *prima facie* evidence of title, and is sufficient for a recovery against trespasser."

Campbell vs. Rankin, 99 *U. S.*, 261; 25 *Law Ed*, 435.

Mr. Justice Miller in his opinion in the foregoing case states:

"The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that only such possessory right as the Act of Congress recognizes in the locator and occupant of a mining privilege was in controversy."

"There is no possible ground upon which a plaintiff's title by adverse possession can be questioned by the defendant who occupies the attitude of a mere subsequent intruder without any title."

Newell on Ejectment, *p.* 720, *Sec.* 24.

We respectfully submit that we have clearly demonstrated that the uncontradicted evidence shows (1) that the Parish No. 2 lode mining claim was staked and marked upon the ground in the year 1899 and while the same was open and unappropriated public domain; (2) that discoveries of gold-bear-

ing mineral rock in place were made upon said claim prior to any intervening right or location by others; (3) that at the time of the trial there was no intervening mining location which would affect any discoveries made upon Parish No. 2 lode mining claim subsequent to the date of its location and the staking and marking of its boundaries; (4) that any testimony which attempts to prove that the discovery claimed by the plaintiff as having been made at the time the Parish No. 2 mining claim was located and upon which such location was originally based, is weakened and loses all its force and effect by reason of the admissions on the part of the defendant's witnesses that gold-bearing rock was, in fact, in place within the exterior boundary lines of said Parish No. 2 mining claim; (5) that both plaintiff and defendant claimed the same ground as mineral ground, each asserting its own independent discovery; and (6) that the annual labor was done and performed upon said Parish No. 2 mining claim each and every year from 1900 to and including the work for 1909 and 1910.

In view of all this, as already hereinbefore stated, the Judge of the Trial Court without any evidence whatever to support his findings held that there was no discovery and the ground was non-mineral in character and the annual labor had not been done for the years 1900 to and including 1908. How and why he arrived at such a conclusion is a mystery which we will not attempt to fathom or solve. It is true that he saw fit to visit the mining claims; but this

could only be for the purpose of enabling him to better understand the evidence submitted in the case.

Such view of the mining claim can not be used as independent evidence in the case. (22 Ency. Pl. & Pr., p. 1055.)

The object of the visit to the mining claim is not to furnish evidence upon which to found a verdict but to better understand and apply the evidence presented in court. (22 Eny. Pl. & Pr., p. 1055. See Groundwater v. Washington, 92 Wis., pp. 5-6.)

VI.

The plaintiff in error based upon findings of fact made by it and presented to the Trial Court and supported by all the evidence in the case, requested the making, signing and filing of conclusions of law Nos. 1 and 2 (P. R. pp. 1676-7) which, in substance, asked the court to conclude that the plaintiff in error was entitled to a writ of ejectment ejecting the defendant in error from the Parish No. 2 lode mining claim, and granting a restraining order restraining the defendant in error from in any wise interfering with plaintiff in error's possession of said Parish No. 2 lode mining claim.

The Trial Court refused to make such conclusions of law and the plaintiff in error has assigned such refusal as error.

We contend that from the uncontradicted evidence in this case that there was no alternative other than to grant the plaintiff in error the writ of ejectment requested in its findings presented to the Trial Court, as aforesaid.

VII.

The Court erred in that part of the judgment and decree where it adjudged and decreed as follows: "It is further considered, ordered and decreed that the plaintiff take nothing further by its complaint herein and except as to the Lotta Jobe mining claim, this cause and action be dismissed without cost to either side." (P. R. 96.)

In Section 914, p. 253 Carter's Alaska Code, costs are allowed as a matter of course to the plaintiff upon a judgment in his favor in actions for the recovery of the possession of real property or right to the possession thereof.

The plaintiff in error recovered judgment in this case for the Lotta Jobe mining claim and therefore is entitled to its costs as a matter of course.

Under this head we further contend that we have fully and amply shown that the action should not have been dismissed as to the Parish No. 2 claim and that the plaintiff in error was entitled to a judgment and decree restoring it to the possession of which it had been ousted.

VIII.

The Court erred in over-ruling the motion of plaintiff for new trial herein.

Motion for new trial was filed in the District Court for the District of Alaska, Division No. 1 in this case within the time required by law. (P. R. pp. 1[illegible]-4). The Trial Court overruled said motion

for new trial to which ruling plaintiff in error excepted. (P. R. p. 1694). This motion for new trial among other statutory grounds, set up that there was no evidence to support the findings of fact, conclusions of law and decision of the Trial Court and that said findings made by the Trial Court were contrary to the evidence and against all the evidence in said cause. (P. R. p. 1694).

As already argued in this brief, there is absolutely no evidence upon which the findings of the Trial Court could be based, and the motion for new trial should have been allowed.

It will fully appear to the Appellate Court that the only part of the judgment and decree of the Trial Court appealed from is that part affecting only the Parish No. 2 lode mining claim. The plaintiff in error served upon the attorneys for defendant in error and filed with the Clerk of the District Court of Alaska, Div. No. 1, a statement describing the parts of the record upon which plaintiff in error would rely and which it thought was necessary for consideration by the Appellate Court. (P. R. pp. 1 to 10).

The defendant in error filed its objections to the signing and certifying of the bill of exceptions prepared in accordance with the praecipe and the statement of plaintiff in error describing the parts of the record and the evidence which it considered necessary and upon which it would rely in prosecuting its writ of error. (P. R. p. 106).

The Trial Court thereupon made and entered an order sustaining the objections of the defendant

in error and refusing to sign and certify the certificate to the bill of exceptions prepared by the plaintiff in error for the reason "that said bill of exceptions does not contain a transcript of all the evidence in said cause." To which ruling of the Court the plaintiff was allowed an exception. (P. R. 104). The bill of exceptions and transcript of record upon which plaintiff in error relied are contained on pages 1 to 1132, both inclusive, of the record, excepting only the exhibits called for in plaintiff in error's praecipe and contained in Vol. V of the printed record herein.

We want to keep strictly within the record in presenting this brief to the Appellate Court. However, we do ask the liberty of making proof that since the trial of said cause application has been made to the U. S. Land Department for a patent to the Parish No. 2 lode mining claim, and that a formal protest was filed by the Government, which is usual in order to give an opportunity for examination by the Government through its special agent and to determine whether or not the land is mineral and that there is a discovery thereon and that said land is subject to location under the mining laws applicable to Alaska; and that since the filing of such formal protest the land has been examined by such special agent of the Government and the said protest has been withdrawn, which, in effect, is a declaration of the mineral character of the land.

If the Appellate Court should permit this proof,

we are ready and willing to furnish the same upon the oral argument of this writ of error.

We appreciate that this brief is long but in view of the fact that we are seeking to set aside findings of fact of the Trial Court, it became necessary to quote in substance the evidence introduced in the trial of this cause.

In conclusion, we have only to say that the plaintiff in error having presented its findings of fact and conclusions of law based absolutely upon all the evidence introduced before the Trial Court in this cause, that the same is tantamount to a request for judgment upon the pleadings and the evidence, and that the Appellate Court should reverse the Trial Court and issue its mandate requesting that judgment be entered in favor of plaintiff in error.

Respectfully submitted,

JNO. R. WINN and
N. L. BURTON,

Attorneys for Plaintiff in Error.

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH JUDICIAL CIRCUIT.

THE EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The facts of this case as presented by this record, in so far as they concern the merits of the writ of error, are few and simple.

The Alaska Juneau Mining Company, defendant in error, through its agents and employees, entered upon a tract of land through which Gold Creek flows, for the purpose of appropriating the water of that

creek for mining and other beneficial purposes. The Ebner Gold Mining Company, plaintiff in error, claimed that the entry was upon lands owned by and in possession of that company, to wit: the Lotta, a patented claim, the Parrish No. 2—claimed as an unpatented location—and the Cape Horn Lode claim, and brought ejectment to recover possession. The defendant in error denied the title of plaintiff in error to the Parrish No. 2 and Cape Horn Lode claims, asserting that the land upon which its entry was made was covered by valid subsisting locations called the Oregon and Canyon Lode claims (covering practically the same area as the Parrish No. 2), claimed by it through mesne conveyances from the locators. In constructing its diverting works the defendant in error originally placed a small part of the abutment of the dam on the patented Lotta Claim. But all the remaining works were on the area common to the Parrish No. 2 and the Oregon. The real controversy in the case was over the validity of the Parrish No. 2 and the Oregon and the rights of plaintiff in error set up in the second cause of action. Judgment passed for plaintiff in error as to the Lotta. The plaintiff in error voluntarily abandoned its claim of title to the Cape Horn.

The trial court found that neither the Parrish No. 2 nor the Oregon were valid mining claims; that there was no sufficient discovery upon which to predicate a location of either; that each was made purely as a mat-

ter of "convenience," and that at the time of the entry of defendant in error upon the land in question it was open public land, not in the possession of plaintiff in error. The Court thereupon ordered the second cause of action dismissed. From this order the writ of error is prosecuted.

It seems apparent from this statement of the case that unless it be affirmatively shown by plaintiff in error that there was no evidence to support these findings, or unless in the progress of the trial the court below committed some substantial error prejudicial to the plaintiff in error, the judgment of the court below must be affirmed.

ASSIGNMENTS OF ERROR.

With the exception of two or three instances where it is claimed that the court below in the conduct of the trial committed errors prejudicial to the plaintiff, the assignments of error are based upon either (a) the refusal of the court below to making certain findings of fact, as requested by plaintiff, (b) the making of the findings upon which the judgment rests. In other words, it is not contended that there was *no* evidence in support of the findings made by the Court, but it is contended that in the presence of a conflict the Court should have found the facts as claimed by the plaintiff.

Assignments of this character are valueless. Similar assignments were before this Court in the case of

Empire State Idaho M. & D. Co. vs. *Bunker Hill & Sullivan M. & C. Co.,* 114 Fed., 417, and it was there ruled that

> "it is very clear that these assignments are unavailing."

This effectually disposes of assignments V, VI, VII, VIII and IX.

The case was tried by the Court without a jury. The rule in cases of this character is stated by this Court as follows:

> "The case having been tried without the intervention of a jury, the Court's findings are conclusive of the question of fact unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court whether special or general will not be disturbed if there is any evidence upon which such findings could be made."
>
> *Cook* vs. *Robinson,* 194 Fed., 753, 759.

> "Whatever conflict there is in the evidence was resolved against the plaintiffs by the Judge of the court below,—whose findings are in cases like the present always to be taken as presumptively correct, and unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in consideration of the evidence, the findings should not be disturbed."
>
> *Thorndyke* vs. *Alaska Perseverance M. Co.,* 164 Fed., 657, 665.

The general rule as to this presumption in favor of the findings is well recognized. But as it may be contended that some distinction exists with reference to cases appealed from Alaska, we confine ourself to the citation of cases determined in this Court on appeal or error from the Alaska Courts. To the cases heretofore cited we may add the following decided by this Court:

McIntosh vs. *Price,* 121 Fed., 716, 717;
Moore vs. *Moore,* 121 Fed., 737;
Hemple vs. *Raymond,* 144 Fed., 796, 800.

The only pertinent inquiry to which we submit counsel for plaintiff in error should address themselves, is as to whether there was *any* evidence introduced to show lack of discovery on the Parrish No. 2. This inquiry seems to be studiously avoided in Plaintiff's brief. The case has been presented by them upon the theory that this Court can review conflicting evidence and determine its weight. The statement in the brief of plaintiff in error at page 39 subd. (a) that "we contend that it was shown upon the trial of this case by a great preponderance of evidence, if not by the undisputed proof" confirms this. As heretofore shown this Court will not weigh conflicting evidence but will accept the findings of the court below as conclusive.

I.

THE QUESTION OF DISCOVERY ON THE PARRISH NO. 2 CLAIM.

The pivotal question in the case was the discovery on the Parrish No. 2 and its sufficiency to support a location. It was a question aggressively fought on both sides.

We think our duty in the premises only requires us to point out that there was some substantial evidence of a total lack of discovery. This we proceed to do.

At no time during the trial did plaintiffs seriously urge that a discovery had been made by the locator of the Parrish No. 2 at any other point than the cut at the Borean pit. Their witness Ebner, the original locator of the Parrish No. 2, testified as follows:

> "A. Why the discovery on the Parrish No. 2, Mr. Shackleford, is just north of a pit, an old pit, that was there.
>
> "Q. The Borean pit?
>
> "A. The Borean pit and the bedrock stuck out in one place there and showed quartz—that was the discovery for the Parrish No. 2" (Trans., page 715).

In its brief, however, appellants refer (page 73) to various other discoveries which they claim were undenied. This contention is clearly not in accord with the evidence. All of these so-called discoveries were al-

leged to have been made on the southeasterly half of the Parrish No. 2 claim. Defendant's witnesses after an exhaustive examination of that portion of the claim, reported to the Court as follows:

TESTIMONY OF R. A. KINZIE, pages 765, 766, 767:

"Q. I am speaking now of the portion of the Parrish No. 2 lying between Gold Creek or the banks of Gold Creek and the southerly end line. What is the condition of that part of the claim with reference to there being any rock in place anywhere near the surface?

"A. The southerly end line?

"Q. Yes; I mean along where the Borean pit is.

"A. *That is entirely covered by rock slide in the southeast portion, all the way*—it is made up of two slides, one in the vicinity of Miller's Gulch and the other coming from a point on the north side of Snowslide Gulch.

"Q. How about the Borean pit—any rock in place anywhere in that vicinity?

"A. In the Borean pit itself?

"Q. Yes.

"A. No, there is not.

"Q. Do you know where that open cut is—the Borean pit?

"A. I do.

"Q. Is there any rock in place in the neighborhood of that open cut?

"A. I didn't see any.

"Q. Did you examine it?

"A. I did.

"Q. Answer the question whether there is or not.

"A. I don't think there is any bedrock within at least thirty or forty feet, if not more, of the bottom of the Borean pit itself (704).

"Q. Is there, Mr. Kinzie, any rock in place in the Borean pit, at the Borean pit or within a radius of 50 or 100 feet on each side of the pit?

"A. No, there is not—you mean to be seen?

"Q. Yes.

"A. No, there is not.

"Q. How deep, in your opinion, is the slide rock there?

"A. The slide rock, starting at a point—starting at Miller's Gulch and following along Gold Creek until you come to a point almost in front of the two Alaska-Juneau tunnels and then going straight south to the side line of the Colorado or very likely a little southeast from that point—the country above is entirely covered by slide rock.

"Q. To what depth?

"A. It is varying from a few feet, practically nothing at that point to I should judge, 50 to 80 feet (705).

"Q. To what depth is the country covered by slide in the vicinity of the Borean pit, in your opinion?

"A. From the topography of the country I would say it would vary from 50 to 80 feet."

SAME, pages 880, 881, 882:

"Q. Going back to your opinion as to the depth of the slide on the Parrish No. 2 lode claim at its

southeasterly end, when did you say you first made an investigation as to that slide?

"A. I don't believe I said.

"Q. When did you?

"A. I have known in a general way of the slide there for a long time. I went up there last Sunday to make sure, to look at it in detail.

"Q. Then, did you examine over every bit of that claim, say from the claim up the hill to the southeasterly end line of the Parrish lode No. 2?

"A. Why, I went up and down there three or four times, I think, virtually to the creek. There are two slides there and I was trying to follow out where the junction was."

TESTIMONY OF B. D. STUART, pages 976, 977:

"Q. What is the character of the rock in the Borean pit—anywhere in the Borean pit? I will change that. What is the character of the rock in the Borean pit, any place within 75 feet of that open cut in any direction, with reference to being in place or otherwise?

"A. Not in place—it is slide rock.

"Q. How deep in your judgment is the slide?

"A. I measured the depth of it yesterday, at that open pit—from the bottom of the open cut as it is now to the rim of the Borean pit on the south side, just up from the cut. It is between thirty and forty feet deep there, and the bottom of the cut is still in slide. There has recently been dug a hole in the bottom of that open cut.

"Q. How recently?

"A. Within a week, anyway—within a few days.

"Q. What did you find in the bottom of the hole?

"A. This hole uncovered some large loose boulders, but I could see down between the loose boulders and could see some drift material, I should say three feet below the bottom of the cut as it was made originally (898).

"Q. How large were those boulders?

"A. I should say they were a foot or two in diameter."

SAME, page 1226:

"A. I went up yesterday afternoon on my own initiative and re-examined the ground and did a little picking around there myself and some pick and shovel work underneath the boulder, and went up this morning and dug an open cut, what I considered about the level of the lowest part of the boulder, underneath the boulder for a distance of about seven feet horizontally from what would be the southerly side of the boulder, the one toward the open cut; that brought me almost under the centre of the boulder. Then I sunk or had sunk a little shaft about three feet wide and 4 feet long (1127), perhaps, and we sank down here until we got to a depth of from five to six feet beneath the lowest part of the boulder as it showed underneath. That little shaft was entirely in drift matter, drift material; the bottom of the boulder was plainly visible, however, and very distinct and plain —everything above it was a solid mass of rock and

everything beneath it was loose gravel and boulders of very heavy igneous character—they were granite boulders, pieces of granite and other rock that was entirely different from the boulder itself. As further evidence of being a boulder, when we got to the open cut underneath the entire mass gave evidence of breaking away from its position, and we had to timber it up in order to keep it from falling. I obtained samples from the bottom of the shaft."

TESTIMONY OF R. G. WHALEN, pages 1025, 1026:

"Q. Did you make an examination of the Borean pit?

"A. I did.

"Q. And the open cut shown in the pit?

"A. I did (943).

"Q. What did you find there in the way of open diggings in the Borean pit?

"A. It appears to be a large placer wash and on the south side, on the southeast side of that pit, there is apparently a trench or open cut dug in the wash. The boulders are piled up in the wall alongside of this to keep it from caving in apparently and in the bottom of that.

"Q. Did you find any evidence there of recent excavations?

"A. There was a hole I saw this morning that has been dug since I was there last time.

"Q. What, in your opinion, is the condition of the surface of that ground as to being in place or not?

"A. In my opinion that is slide rock.

"Q. How deep is the slide rock?

"A. From the condition of the ground there and from the outcrops further down I should judge it would be about twenty feet deep there.

"Q. Did you examine the bedrock where it shows in Snowslide Gulch and on the creek?

"A. I did.

"Q. How does the character of the bedrock at those points compare with the pieces of rock that protruded from the surface in the neighborhood of the Borean pit?

"A. It is entirely different from the boulders in the pit in the vicinity of this slide, with the exception of a few small pieces of loose rock that are somewhat similar.

"Q. I am speaking of the boulders that project from the surface and are apparently in a slide condition.

"A. It is entirely different from them" (944).

In addition to the testimony of expert witnesses showing that the ground on which plaintiff's discoveries were alleged to have been made was covered with slide rock to a depth of from twenty to fifty feet, the trial judge was able to support his findings by his personal conclusions reached after a view of the premises in dispute under guidance of an expert from each side. These experts pointed out to the Court the matters and things referred to in the testimony by the various witnesses. It was expressly stipulated (transcript, page 1888), that the fact of this visit should be included in the record of the case and sub-

mitted to the Circuit Court of Appeals as a part thereof.

The foregoing excerpts from the evidence unquestionably show that not only was there a conflict in the evidence as to the existence or non-existence of a discovery to support the Parish No. 2 location, but that the preponderance of the evidence as well as the Judge's personal conclusions based on his own examination of the property, support the findings. This case is clearly within the rule which prohibits the Circuit Court of Appeals from reviewing these findings of fact further than to determine that a conflict in evidence exists.

In the case of *McIntosh* vs. *Price,* 121 Fed., 716, 717, a case somewhat similar to the one at bar, this Court held that the testimony of one opposing witness was sufficient to establish the existence of a conflict, and under such circumstances the findings would not be disturbed.

In the case at bar there is much cumulative testimony of a convincing character which supports the finding of lack of discovery.

II.

ANNUAL LABOR PRIOR TO 1909.

The Court having determined that the location of Parrish No. 2 was invalid by reason of a lack of discovery, it would seem apparent that the question of the annual labor became an immaterial one, and the

rulings of the Court in this behalf, if erroneous, were not prejudicial to plaintiff. No location having been properly made, in the first instance for lack of discovery, no amount of annual labor could validate it. A failure to do this work therefore could not work a forfeiture of something which never existed.

The issue, however, was before the Court. It was tendered by the plaintiff in his opening testimony and rebutted by the defendant, and, of course, as neither party could forecast the ruling of the Court on the question of the validity of the Parrish No. 2 location, the issue was tried and a finding made. We think in the light of the Court's finding of a total lack of discovery in the Parrish No. 2, everything in the record on the subject of the annual labor became immaterial. But as plaintiff in error assails the finding we are at liberty to discuss it.

The sixth finding of the trial court was to the effect that no assessment work required by law to the extent of $100 each year was performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish No. 2 claim prior to the year 1909. To this finding plaintiffs in error strenuously except. The reason for their objections will be apparent if we examine the Act of March 2, 1907, wherein Congress provided that upon failure to perform assessment work during any given year mining claims in Alaska become absolutely open to "location by others as if no location of the same had

ever been made." Under this statute there can be no saving of locator's rights by resumption of work prior to the intervention of other parties. Where the statutory period has elapsed for doing assessment work, *ipso facto,* the former location becomes invalid. This construction of the act has been expressly upheld and its effect compared with that of Section 2324 Revised Statutes in the case of *Thatcher* vs. *Brown,* 190 Fed., 708, 711.

In that case, which came to this Court on appeal from Alaska, Judge Ross said:

> "Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

If, therefore, the findings of the trial court on the question of non-performance of annual labor prior to 1909 are conclusive, plaintiff's location of the Parrish

No. 2, made in 1899, even if valid in other respects, lapsed shortly after its initiation owing to non-performance of assessment work. Whatever right plaintiff may have had to reinstate the location by resumption of labor was effectually terminated in 1907 by the Act of March 2nd of that year. We need not discuss what would have been the effect of plaintiff's resuming work prior to that year without relocating. It is sufficient that they did not resume it. There being no location to support their attempted resumption of annual labor in 1909, these attempts were, of course, ineffectual for any purpose.

Plaintiff in error characterizes the finding of the Court that the annual labor on the Parrish No. 2 claim was not done in 1907 and 1908 as "arbitrary, inconsistent and unreasonable, and unsupported by any evidence whatsoever in this case" (brief of plaintiff in error, page 106). As in the case of the discovery question, it is needless to say that the record does not bear out this harsh criticism of the Court.

Some evidence was offered that during various years some work had been done looking toward the doing of assessment work, consisting of permitting the water to flow through the Borean pit, the construction of ditches and trails across the claim for the benefit of other claims and the like, but it was shown that in 1910 there were no evidences upon the ground that any work had ever been done, except probably the driving of a very small tunnel near the Gold Creek Canyon

(testimony O. M. Harry, transcript, page 1006). Witness R. A. Kinzie testified (transcript, page 795), that he was on the ground covered by the Parrish No. 2 lode claim in August, 1910, that there was no one in possession then except O. M. Harry, an employee of defendant, and no sign of a habitation, building, or construction of any kind on the ground. In addition to this the trial judge viewed the ground in dispute, as hereinbefore stated, and was able to see for himself how much labor had actually been performed on the Parrish No. 2 claim. Thus it will be apparent that there was at least a conflict in testimony as to whether assessment work had been done, and in view of this conflict the Court's findings must be conclusive here. However, the finding was upon an issue which became immaterial by reason of the decision of the Court on the question of discovery. If there was any error committed it was in no sense prejudicial.

III.

POSSESSION.

Failing to establish any legal title in itself to the Parrish No. 2 Claim such as would properly support an action in ejectment, plaintiff in Part V of its brief on appeal, falls back on the principle of *pedis possessio* as justifying its case. Counsel avers that even if plaintiff had no title to the ground in controversy, that it was in possession and was ousted from possession by

defendant, and therefore entitled to maintain ejectment.

This argument also is met by the findings of the trial court. The fifth finding in part reads:

> "That the plaintiff *is not and never has been* seized, *possessed* or *entitled to the possession* of that certain tract of ground described in paragraph 3 of the plaintiff's second cause of action, set forth in the amended complaint herein, and known and referred to as the Parrish No. 2 lode mining claim" (Transcript, page 87).

Again, in paragraph seven the Court finds:

> ". . . and that at the time of said location and erection of said dam and flume and the diversion and appropriation of said water, the said property so described as the Parrish No. 2 lode mining claim was a part of the *unoccupied, unsegregated* public domain of the United States" (Transcript, page 89).

These findings as to the condition of the ground at the time of defendant's entry thereon are conclusive and binding on this Court, on the authority of the cases heretofore cited. Moreover, they are amply supported by the testimony of O. M. Harry, who made the first entry on the ground for defendant, being employed to start the preliminary work toward construction of the dam and intake. We cite from his testimony:

TESTIMONY OF O. M. HARRY, Transcript, pages 1006, 1007:

"A. I went up on August first and looked the claim all over as much as I could that day, to see if there had been any assessment work done on it and I didn't find any; then I came down to the present location of the cabin, cleaned off (925) some brush there in case I sent some one up there to start the work, so they would know where to start the cabin and started a short piece of trail up the creek. That was on August first. August third I went back to the present location of the cabin and up the creek, cut some steps up the bank, towards where the present location of the flume is, with a view to getting around up to where the dam now is located, and I started up along the bank and it was too hard for me to get around that way, and I went up on top of the hill over the road and went around south of the present dam site and cut a piece of trail where the dam is now. I went up and put in some boards in there to change the water, to wash the gravel off, as I was told to clean out everything there and get everything ready to start the dam at a point lower down, and I went down and cleaned out tree-tops and boards and some rocks and threw them into the creek.

"Q. At what point?

"A. At about where the dam is now, and I got through that day and started to come down the flume-line to come to Juneau, and I saw a hole in the bank on the south side of the creek that looked like a tunnel, and I went over and examined that.

While I was examining the claim on the first, this being down right under the cliff, I did not see it, but on the third I saw this hole and went over and went into it.

"Q. Now, describe to the Court the apeparance of that tunnel with reference to age and marks.

"A. It was grown with grass and weeds and bushes and moss and didn't look like there had been anything done in it for some time" (926).

SAME, page 1008:

"Q. What age did this appear to have since work had been done on it?

"A. I don't think by the looks of the tunnel there had been anything done in the inside for a couple of years."

SAME, page 1011:

"Q. While you were doing this work up there were you interfered with at any time?

"A. No, sir."

SAME, pages 1013, 1014:

"Q. Was there any sign of habitation on the ground below the present dam site when you went up there?

"A. No, sir" (932).

"Q. Where anybody could live?

"A. No.

"Q. Or occupy the claim 24 hours in the day?

"A. No, sir.

"Q. Was there a blacksmith-shop or a structure

at the mouth of the tunnel that you have been speaking of when you went up there?

"A. Not when I went up there. There was later on.

"Q. Any sign of one?

"A. No."

We think it unnecessary to argue the legal refinements of the rule of *pedis possessio,* as plaintiff in error has absolutely failed to establish by the Court's findings or the evidence that it was in possession of the ground in controversy at the time of defendant's entry.

Since counsel has cited two cases in support of his contention, however, we note that neither decision applies to the case at bar. In *Protective Mining Co.* vs. *Forest City Mining Co.,* 99 Pacific, 1033, it was *admitted in the pleadings* that the plaintiff was in actual peaceable possession, and in *Campbell* vs. *Rankin,* 99 U. S., 261, the trial court *refused to admit evidence* of the plaintiff's possession and a new trial was ordered to determine this point. In the case at bar, plaintiff's alleged possession was denied in the pleadings, and although ample opportunity was afforded for proof of such occupancy on trial of the cause, plaintiff absolutely failed to establish its case in this respect, and the Court so found.

IV.

THE LOCAL CUSTOMS IN THE HARRIS MINING DISTRICT AS TO ENTRY UPON UNPATENTED MINING CLAIMS FOR PURPOSE OF APPROPRIATING WATER.

The testimony clearly shows that there was a custom prevailing and generally observed in the Harris Mining District, which permitted an entry upon an unpatented mining claim by one seeking to appropriate water flowing through it.

(See testimony of Bullard, transcript, page 1072; Hartrader, page 1082; Boyle, page 1090; Tracy, page 1100; Morse, page 1106; Kennedy, page 1112; Moore, page 1117; Hudson, page 1155; Kinzie, pages 1171, 1181; Marks, page 1175; Miller, page 1211; Wells, page 1215; Lockhardt, page 1218; Howell, page 1222).

This custom was set up by defendant in error as an additional defense. If the Court had found that the Parrish No. 2 was a valid subsisting mining claim, the question of the validity of this custom, as conferring the right upon defendant in error to enter upon the claim for the purpose of appropriating the water of Gold Creek would be an important one. Upon the record here presented, however, the question is unimportant and academic. The Court having found that at the time of the entry of defendant in error there was no valid subsisting mining claim, the question of the validity and effect of the custom became immaterial,

and the action of the Court in permitting the defendant in error to plead and prove the existence of the custom and the finding that such custom existed, was of no serious moment. If it was error it was harmless and non-prejudicial.

There is much to be said in favor of the validity of the custom.

The location of a mining claim in Alaska is not an appropriation of the water running through it. Riparian rights to water do not exist in Alaska.

Van Dyke vs. *Midnight Sun M. & D. Co.*,
177 Fed., 85.

A rule which would permit locators to cover the entire banks and beds of the mining streams by attempted locations of the character of the Parrish No. 2, without attempting to appropriate and use the water, and excluding all others from making such appropriation would be a serious matter.

However, we do not think upon the state of the record we are called upon to sustain the validity of the custom. This important question had best be reserved for consideration in a case where it is directly and necessarily involved.

The foregoing argument covers the principal points raised by plaintiff in error's brief, viz: the question of discovery, assessment work and actual possession of the alleged Parrish No. 2 claim, and defendant's rights under the customs of the Harris Mining District.

We will treat briefly the remaining points raised by plaintiff which are entirely on questions of procedure and, as we shall demonstrate, do not show any reversible error in any event.

V.

ALLEGED INCONSISTENCY IN ANSWER.

Plaintiff in error specifies that the trial court denied its motion to strike certain portions of defendant's answer and thereafter overruled a demurrer to those portions. The parts of the answer objected to, set forth first an affirmative defense, in the alleged ownership by defendant of the Oregon and Canyon claims conflicting with the Parrish No. 2, and, second, a right, regardless of the ownership of the ground in dispute, under the customs of the miners to carry water across the Parrish No. 2. These defenses are clearly not inconsistent. Defendant said, in effect: "We allege and "expect to prove that we own the disputed ground, "but if the Court should find against us on this, we "still claim the right to divert and carry water across "it for mining purposes, regardless of ownership." If defendant owned the ground, of course it could build a flume across it; if it did not own it, it still had the right to build a flume under the miners' customs. The trial court having found against both plaintiff and defendant on the question of ownership, plaintiff in error can not claim that it was injured by the allegation of that defense.

VI.

AMENDMENT OF ANSWER AFTER TRIAL.

Plaintiff in error alleges that the trial court erred in permitting defendant to amend its answer after trial of the cause but before final submission. In the first place the amendment was made so as to allege more specifically the forfeiture of the Parrish No. 2, a fact which was proven on trial of the cause. Plaintiff's case was not prejudiced by such amendment in the least, for the entire issue is now immaterial. In the second place, if plaintiff's counsel was in any degree taken by surprise by this amendment, the record does not show that he applied for leave to reply or asked for a continuance of the case, or moved to re-open the cause for the admission of additional evidence. Such being the case the allowance of this amendment by the Court was clearly within the provisions of Section 92, Part IV, Carter's Code, providing that pleadings may be amended after trial and before the cause is submitted:

> "When the amendment does not substantially change the cause of action or defense *by conforming the pleading or proceeding to the facts proved.*"

VII.

CONCLUSIONS OF LAW NOT ERRONEOUS.

Plaintiff in error further specifies that the conclusions of the Court from the facts found were erroneous. In arguing this proposition, however, counsel ignores the findings and says that the conclusions were against the evidence. This is, of course, no argument at all. In order to attack the Court's conclusions of law, counsel must assume the findings of fact as correct and show that the Court drew wrong conclusions therefrom. Having found that plaintiff had made no discovery on the Parrish No. 2 claim and that assessment work had not been done prior to 1909, there can be no question but that on the basis of such findings the Court was perfectly correct in concluding that the location was void and of no effect.

VIII.

COSTS.

Plaintiff in error claims that costs should have been awarded to it because it obtained judgment for restitution of the Lotta claim. Counsel cites Section 510, Part IV, Carter's Code, as authority for this claim. The section in question provides that plaintiff shall be allowed costs as, of course, upon a judgment *in his favor*. In the judgment in the case at bar (Trans.,

page 93), the Court holds, after granting the writ as to the Lotta claim:

> "It is further considered ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein, and except as to the Lotta lode mining claim this cause and action *be dismissed* without cost to either side."

It is difficult to see how counsel can construe the above language as constituting a judgment in plaintiff's favor, especially in light of the appeal to this Court. The writ of error was sued out to reverse the judgment of the trial court against plaintiff in error dismissing the cause as to the Parrish No. 2 claim (petition for writ of error, Trans., p. 124), wherein costs were awarded to neither party.

IX.

NEW TRIAL.

In its eleventh specification of error plaintiff in error sets forth that the trial court erred in overruling plaintiff's motion for a new trial.

This specification was not a proper assignment of error and can not be considered by this Court. It has been repeatedly held that an order of court overruling a motion for new trial is not reviewable on writ of error.

> *Loveland on Appellate Jurisdiction,* Sec. 56;
> *Moore* vs. *United States,* 150 U. S., 57, 61;

Blitz vs. *United States,* 153 U. S., 308, 312;
Railway Company vs. *Heck,* 102 U. S., 120.

Hence this specification may be dismissed without further comment.

Upon the case as presented by the record we respectfully submit that the judgment should be affirmed.

CURTIS H. LINDLEY,
Attorney for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

THE EBNER GOLD MINING COMPANY, a corporation, *Plaintiff in Error,*	
vs.	No. 2155.
ALASKA JUNEAU GOLD MINING COMPANY, a corporation, *Defendant in Error.*	

Reply Brief of Plaintiff in Error

JNO. R. WINN and
N. L. BURTON,
Attorneys for Plaintiff in Error.

In the
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REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for the defendant in error on page 3 of his brief, under the heading "Assignment of Error," states among other things as follows:

"In other words, it is not contended that there was *no* evidence in support of the findings made by the court, but it is contended that in the presence of a conflict the court should have found the facts as claimed by plaintiff."

It will appear evident to this Honorable Court that counsel for defendant in error is mistaken in the above assertion. He would only have had to read over our brief to have ascertained his mistake. We have stated both in oral argument and in our brief over and over again that there was *no* evidence to support the material findings of fact which the trial court made against the plaintiff—we have cited

authorities to show obvious error by the trial court in the application of the law and *serious* or *important* mistakes made by the trial court in the consideration of the evidence produced upon the trial—and for these reasons contend that instead of the doctrine that is laid down in the case of *Thorndyke vs. Alaska Perseverance Mining Company*, 164 Federal, 657-655, being against our contention in the present case, that it is in our favor. The court there states substantially to the effect that findings are always to be taken as presumptively correct; unless an obvious error has intervened in the application of the law or some *serious* or *important* mistake has been made in consideration of the evidence, the findings should not be disturbed. We submit that in this case it clearly appears that *serious* and *important mistakes* have been made and think that we will have successfully shown this to this Honorable Court after filing this reply brief.

We will in this reply refer to the plaintiff in error as plaintiff, and the defendant in error as defendant, and proceed to reply to defendant's brief in the following order:

First—Discovery.
Second—Annual Labor.
Third—Possession.

I.

DISCOVERY.

Judge Hunt, one of the Circuit Judges constituting the Appellate Court at the time the oral argument was made in this case, asked our Mr. Winn substantially, why it was that the lower court found against the plaintiff on the question of *discovery?* For fear that this interrogatory was not clearly answered upon oral argument we think we can demonstrate to this Honorable Court to a mathematical certainty why and how it was that the trial court found against the plaintiff, as to its discovery upon the Parrish No. 2 Mining Claim. At the very outstart of the answer brief of the defendant the following statement on page 6 in relation to discovery on the Parrish No. 2 claim is made, "At no time during the trial did plaintiff seriously urge that a discovery had been made by the locater of the Parrish No. 2 at any other point than the cut at Borean Pit." It will also clearly appear from the record that it was the contention of counsel who represented the defendant upon the trial of the case in the lower court that that court could not consider any other discovery except the one made at the Borean Pit, and the court must cer-

tainly have followed this theory because we are unable to account for the finding of the trial court on any other hypothesis or theory. In other words, the court ignored the *undisputed evidence as to any subsequent discoveries* made by Mr. Ebner upon the mining claim in question. It is also very evident from the answer brief of the defendant that Judge Lindley has ignored in his argument the other discoveries made by Ebner, and has endeavored to base his case upon the question of there being a conflict in the evidence pertaining to the discovery made at the *Borean Pit*, and upon this ground attempts to justify the finding of the trial court with respect to there being *no sufficient* discovery. To further prove our contention in this respect, that is both the trial court and counsel for the defendant have considered the case in respect to discovery solely in the light of the discovery at Borean Pit, we call this Honorable Court's attention to the carefully selected portions of Ebner, Kenzie, Stewart and Whalen's testimony, contained on pages from 6 to 12 inclusive of defendant's brief. All of this testimony so cited refers to the Borean Pit and the discovery made at that place and to that discovery alone. Of course, counsel for the defendant argued that Kenzie's testimony regard-

ing certain slides was sufficient to contradict any and all evidence introduced by the plaintiff pertaining to any and all discoveries, but we think if this Honorable Court will read over the portion of Mr. Kenzie's testimony above referred to in connection with his testimony that we have quoted and had printed in our first brief, it will come to the conclusion that no such construction can be placed upon Mr. Kenzie's testimony taken as a whole or in part, but on the other hand it corroborates our proof of other discoveries on Parrish No. 2.

The reading of those portions of the testimony of the witnesses Stewart and Whalen, referred to by the defendant, will immediately convince anyone that these two witnesses so far as the quoted testimony is concerned, refer only to the discovery claimed to have been made at the Borean Pit.

In connection with Kenzie's testimony we invite this court's attention to the excerpts printed in our brief in chief on pages 61-66 inclusive, and while reading the same bear in mind that it is a conceded fact in this case that the Oregon and Canyon Lode claims, under which locations the defendant was claiming the ground in controversy, covers practically the same surface ground as the Parrish No. 2. (See Defendant's Brief, page 2.)

Kenzie, who is agent and superintendent of the defendant, states in effect that in 1899 (at the time Corbus located the Oregon) he went up Gold Creek, on which creek the Oregon Lode claim was located, as far as he could go up said creek, and up the hill on the Oregon claim. That he went over the ground and determined as far as he could by looking at it the general line that the mineral zone passed through and found mineralized shist and quartz in place; that he did not make any assay of it, but thought it was mineral bearing or gold bearing rock. Then in testifying in relation to the discovery made on the Oregon claim, as located by Corbus and as located by Datson, marked on defendant's Exhibit 7 (P. R. p. 1722), the letter "A" as the point of discovery, and on being questioned as to where the rock in place was found by him when he went over the Oregon claim referred to the exhibit in question and the point at letter "A" and stated that to the best of his recollection it was both on the south side, the north side, and all around said point; and the witness goes on and explains how the formation or the mineral bearing rock is crossed-cut and shown up by Snow Slide Gulch and Gold Creek; also testifies as to the discovery that was made on the Canyon Lode claim, and stated in his judgment that that discovery was on the Parrish No. 2. All of this evi-

dence concerning discoveries on the Oregon, which claim covers practically the same ground as the Parrish No. 2, is corroborative of the discoveries which Ebner testified he made upon the latter claim.

From pages 67 to 69, inclusive, we have in our brief in chief excerpts taken from the testimony of the witness W. R. Lindsay, a witness on behalf of the defendant, a mining engineer and the locater of the Canyon Lode claim. This witness in effect states that he made the discovery on the Canyon Lode claim and that the discovery was very near the common sideline of the Parrish No. 2 and the Lotta Lode claims, and that there was no trouble in finding rock in place anywhere on Gold Creek from where he made the discovery for six or seven hundred feet on either side, meaning both up and down the creek, and that by rock in place he meant mineralized rock carrying values, as he had assayed it. This testimony also corroborates the testimony of our witness Ebner in the discovery which he claims he made on his lode line, where it intersected Gold Creek, for the reason this discovery point on the Canyon claim is conceded to be at least within fifty feet of defendant's dam, which said dam is on the common sideline of the Lotta and Parrish No. 2 claims.

We here call the court's attention to that portion of Mr. Ebner's testimony contained in our first brief on pages 45 to 59, inclusive. On page 48 he states that he discovered quartz in place carrying gold values near the southeast center stake of the Parrish Lode claim, and this is the discovery that is referred to as at the Borean Pit. On the same page he states that where the center or lode line crossed the creek about four or five hundred feet from the Borean Pit discovery and near the center of the Parrish No 2, he found rock in place carrying value. (The words "old line" as printed in the brief should be "lode line," as the reading of Mr. Ebner's evidence will clearly show that the stenographer has made a mistake and instead of using the word "lode" has used the word "old.") Then he claims that he had the rock in place assayed and that the general value of the ore all up and down the creek (meaning Gold Creek) is from $1.50 to $3.50 per ton. Witness further states on cross examination by defendant's counsel which is shown at page 51 of our brief in chief, when the question was propounded to him, "Where else?" (meaning "Where else did you find the discovery?" states substantially that at another point down the creek where he had started a tunnel, and up on the bank

where he had piled quartz and where he had made a large open cut that he had found good pay rock in place, and on page 52 states that he had taken an average sample and that it would assay. The witness continues to positively locate this discovery on his cross examination. On page 54 he points out on one of the exhibits another place where he had made a discovery of mineral bearing rock in place on the Parrish No. 2, and states that it was near the Letta line and almost opposite a certain cabin which he pointed out on one of the exhibits. On page 55 he states another discovery made on the Parrish. The witness further tells that in 1903 he continued to cross-cut and dig ditches and thoroughly prospected the ground, and that he stripped down to bedrock and took assays to ascertain where the values were, and that he found that there were values, and in that year he built the blacksmith shop and started to run the tunnel on the Parrish No. 2, which is shown in some of the photographs to be down near the creek bed. In our first brief we called the court's attention to all these discoveries and to this testimony of Mr. Ebner, and challenged and defied counsel for the defendant to cite any evidence of testimony from the record in this case that would in any manner contradict Mr. Ebner's testimony concerning any and all of these discoveries,

except the one made at the Borean Pit, and counsel for the defendant has utterly failed in our opinion to do so, and has thus conceded that there is no contradictory evidence in the entire record pertaining to any discovery, except the one at the Borean Pit. Ebner's testimony about the other discoveries is absolutely uncontradicted and in many respects has been even corroborated by the officers and agents of the defendant company. The court will also bear in mind that all of these discoveries were made prior to any claim whatsoever made by the defendant company or any of its grantors to any of the surface ground of the Parrish No. 2 Lode claim, or to any water or water rights on Gold Creek, and in view of this evidence, uncontradicted as it is, and supplemented by the fact that both plaintiff and defendant are claiming the same surface ground and the same lode, under their respective mineral locations, and the further fact that the ground has been classified by the Government as mineral ground—with all due deference to the finding made by the lower court that "no sufficient discovery" had been made upon Parrish No. 2 claim, it would in our opinion be absolutely unjust to permit a judgment to stand based upon such finding.

> "Whether there is any evidence in support of a finding is a question of law, and if the

finding is unsupported by evidence, or if a fact material to a finding upon which the judgment is based is unsupported by evidence, the judgment will be reversed."

3 *Cyc.* 362.

"A judgment against evidence, fairly amounting to proof without conflict, is not within the rule that the appellate court will not reverse on the mere weight of the testimony."

Fulmer vs. Packard, 5 Ind. App. 574, 32 N. E. 784.

II.

ANNUAL LABOR.

As to annual labor prior to the year 1909, being the year when the trial court held the annual assessment work was done, we have fully shown in our brief that each and every year from and including the year 1899 up to and including the year 1910, the year when this case was tried in the lower court, at least $100 was actually spent for work and labor done and performed upon the Parrish No. 2 Lode mining claim. We have asserted and here reiterate that there is no contradictory testimony to show that this expenditure was not in fact made. It appears from our brief by testimony fully corroborated and substantiated, that at least $100 was actually paid each and every year during the time

aforesaid to the men doing and performing the work; and further, the men so receiving the money for doing the work and labor prior to the year 1907, and including that year and subsequent years, testified to receiving the money for such work and labor which they had performed upon said Parrish No. 2 claim.

As contended in our brief *where the work is done directly upon the claim itself, it becomes immaterial whether such work and labor does in fact benefit the claim.*

See *Morrison Mining Rights*, 14 Ed. 120;
Wailes vs. Davies, 158 Fed. 667;
Lindley on Mines, 2nd Ed., Sec. 629, p. 1162;
Morrison Mining Rights, 14 Ed. 117;
U. S. vs. Iron-Silver Co., 24 Fed. 568;
St. Louis Co. vs. Kemp, 104 U. S. 636.

We have particularly emphasized in our brief that *courts will not enforce a forfeiture except upon clear and convincing proof of the failure of the former owner to perform the amount of labor required by law.*

See *Loeser vs. Gardner et al.*, 1 Alaska Rep. 641;
Wulff vs. Manual, 23 Pac. 723;
Mattingly vs. Lewisohn, 35 Pac. 111;

Thomson et al. vs. Allen et al., 1 Alaska Rep. 636;

Prov. Gold Min. Co. vs. Burke, 57 Pac. 641;

Ames vs. Kruzner et al., 1 Alaska Rep. 598;

McCullouch vs. Murphy et al., 125 Fed. 147;

Whalen Consol. Cop. Min. Co. vs. Whalen et al., 127 Fed. 611;

Hammer vs. Garfield Min. etc. Co., 130 U. S. 291;

Lockhart vs. Johnson, 181 U. S. 516;

McKay vs. Neussler, 148 Fed. 87.

In view of the foregoing authorities, we would ask what evidence is there in this case to support the finding of the District Court that the necessary assessment work prior to the year 1909 had not been done and performed on the Parrish No. 2 Lode claim?

To support such a finding it would have to be conceded:

(1) That the fact of spending $100 each and every year, in good faith, in the performance of annual labor upon a mining claim, could at any time later be questioned, and if the improvements visible to the eye upon such claim did not total up the amount of money expended thereon, such claim could be declared forfeited;

(2) That notwithstanding forfeitures are odious in the law, every reasonable doubt would be resolved in favor of a forfeiture of a mining claim rather than to sustain the validity of such claim; and

(3) That instead of requiring clear and convincing proof of the failure of the owner to perform the amount of labor, upon the most meager testimony or without any testimony at all, a forfeiture could be declared.

As stated above, there is absolutely no testimony contradicting the evidence to the effect that $100 was actually paid each and every year since 1899 up to and including the year 1910 for annual assessment work done and performed directly upon the Parrish No. 2 mining claim, and we contend that in this case such proof fully protects the claim so far as annual assessment work is concerned, and to declare a forfeiture under such circumstances is in opposition to, and against the spirit of, the law.

III.

POSSESSION.

The defendant in error in its brief, however, gives extracts of the testimony of O. M. Harry to support the finding of the lower court that the

plaintiff in error was not and never had been seized, possessed or entitled to the possession of that certain tract of ground * * * known and referred to as the Parrish No. 2 Lode mining claim.

We take the liberty of giving a few extracts taken from the testimony of witnesses for the defendant in error, including extracts from O. M. Harry's testimony, which we thing clearly shows that the plaintiff in error was in the actual possession of its mining claims, including the Parrish No. 2 claim, at the time that it was ousted therefrom by the defendant in error.

The cabin referred to by O. M. Harry in the extract of his testimony quoted in brief of defendant in error was built upon the Cape Horn lode claim and not the Parrish No. 2. (See P. R. 923.)

It appears from the testimony of R. A. Kenzie on page 908 of the printed record that other than O. M. Harry, who built the cabin aforesaid, the first work done upon the ground embraced in the Parrish No. 2 claim by the defendant in error, was the commencement and the driving of a tunnel on September 10, 1910. On the next page this witness fixes the date as September 12.

It will be seen from the oral opinion of the trial court (P. R. 1711) in Cause No. 733 B, which was an action to restrain defendant, its agents, servants and employees from crossing over the Parrish No. 2 Lode mining claim, that suit was brought prior to September 2nd by plaintiff against the defendant to prevent defendant from crossing said Parrish No. 2 Lode mining claim with its flume line.

On page 433 of the printed record it appears that on August 25, 1910, in Cause No. 803-A, suit was filed by plaintiff to restrain and enjoin the defendant from going on the premises (Parrish No. 2 claim) and the oral opinion referred to in the preceding paragraph was the result of preliminary hearing in said Cause No. 803-A.

We also call the court's attention to these two last mentioned suits to show that we sought to restrain defendant in the first place from passing over plaintiff's property with the flume.

Al Black, a witness on the part of the plaintiff, testified as follows:

"Q. Now, where were Middleton and the people under Mackay working with reference to where the Treadwell people afterwards put in this dam—not the Treadwell but Mr. Kenzie's people?"

"A. There were other men working—there was Middleton and Graham and McKenna were working

down there on the tunnel on the Parrish No. 2 claim, working on the upper—above there—cutting out a line and brushing and cutting a trail."

"Q. Where were they working with respect to this line that you say you helped to brush out as was referred to as the lower line of the Lotta claim—above that line or this side of that line, that is up or down the creek with respect to that line?"

"A. They were working on the line and they were working above and below—both—right along."
(P. R. 434.)

"Q. Did you notice any of the people under Kenzie up there either on the Lotta or on the Parrish No. 2 Lode claims?"

"A. Well, they were there on the 26th (Sept.) and we ordered them off."

"Q. You have been talking about the 26th—you ordered them off on the 26th?"

"A. Yes."

"Q. What other time?"

"A. I don't know whether they came back the next day—they didn't come back the next and the next day I think it was they came back again."
(P. R. 435.)

"Q. On the 28th?"

"A. And we ordered them off and got them off again—I ain't sure whether it was the next day or the day after."

"Q. Was there any other time that they tried to make an entry again?"

"A. Well, they came in there on the first of October."

"Q. On the first of October?"

"A. On the first of October."

"Q. What did you do then?"

"A. We ordered them off again."

"Q. Was that Mr. Kenzie, Burch or Kennedy?"

"A. That was Kennedy and those Finlanders, I think it was."

(P. R. 434-5-6.)

From the above testimony it appears that on September 26, the plaintiff in error was in the actual possession by its servants and employees of the Parrish No. 2 Lode mining claim and were engaged in driving a tunnel on said claim. That on said 26th day of September, the servants and employees of the defendant in error were ordered to depart from said property, which they did; that on the 28th day of September, the servants and employees of the defendant in error again came upon said mining claim and were ordered to depart therefrom, which they did; that the servants and employees of defendant in error again entered upon said Parrish No. 2 Lode mining claim and were again ordered to depart therefrom. That during all

these times plaintiff in error was and remained in the actual possession of the said Parrish No. 2 Lode mining claim.

It appears from the testimony of Al Graham, a witness for plaintiff in error, on page 530 of the record, that he went to work in the tunnel on the Parrish No. 2 Lode claim on the 19th day of September, 1919, and that he worked there for twenty days, and that at the time of quitting work in said tunnel a man by the name of Mike McKenna, employed by the plaintiff in error, continued the work in said tunnel.

On pages 531 and 532 this same witness testifies that from the 19th day of September up to the day that Kennedy (assistant superintendent of the defendant in error) came there (on the Parrish No. 2 claim) the first and third of October, he and Mike McKenna were working in the tunnel on the Parrish No. 2 claim.

On page 533 of the printed record it appears from the testimony of this witness that he was still working in the tunnel on the Parrish No. 2 claim when Kenzie (superintendent of the defendant in error) and his men came in the vicinity of the Parrish No. 2 claim.

On page 534 this witness also states that Ed Seitz and John Carlson, employees of the plaintiff in error, were working on said Parrish No. 2 claim.

On page 560 of the record Mike McKenna, a witness on behalf of the plaintiff in error, states that he commenced work for the plaintiff in error on the 15th day of September, 1910, and that he continued to work thereon on the 16th day of October.

Fred M. Ridell, a witness on behalf of the plaintiff, states that on September 23rd or 24th a fence was put across the road leading to the Ebner air compressor and a notice posted thereon to keep people off. (P. R. 644-45.)

We submit that the evidence is uncontradicted that during all these times up to and including the 3rd day of October, 1910, upon which date the defendant, by resorting to the criminal arm of the court, had the employees of the plaintiff arrested, plaintiff was in the actual possession of its mining claims including the Parrish No. 2. It was only by keeping up and continuously arresting plaintiff's employees and taking them from their work that the defendant was enabled to get on the Parrish No. 2 claim and construct its flume line. (P. R. 491 to 496 and 601.)

As is shown above there was no actual work done upon the mining claim in question prior to September 10th, or 12th, either in grading or laying the flume line or driving tunnels by the defendant, and the only evidence of anything that was done by the defendant prior to that time upon the claim appears from the testimony of O. M. Harry, quoted in the brief of the defendant, which we submit is practically nil. The building of the cabin by Harry on another mining claim and his residing therein could not give the defendant possession of the Parrish No. 2 claim.

It appears also conclusively from the record that the only color of title, if indeed it can be called color of title, that defendant had at the time that it made forcible entry upon the premises in question, was the posting of a notice on the patented Lotta claim of the plaintiff near the old compressor house and the two location notices posted and perhaps recorded of the Canyon and Oregon lode claims. The water notice having been posted upon patented ground is as we contend void and without any force or effect whatsoever, and the defendant seemed to recognize this fact, for it afterward posted a second location notice of water on or at the point that it constructed its dam. (P. R. 1256 and 31 to 38, inclusive.)

The trial court held that the attempted locations of the Canyon and Oregon claims were void from the beginning. Hence in law and as a matter of fact we contend that the defendant and its agents and employees were at all times naked trespassers upon the Parrish No. 2 claim and the Lotta, without excuse and without color of title. Plaintiff was in possession, as we claim, under a good and valid location, having properly staked and marked the boundaries and posted and recorded its notice of said mining claim and according to the finding of the lower court had done the assessment work upon this claim for the two years just prior to the wrongful entry thereon by the defendant.

> "Plaintiff's right to possession, *or his possession* at the time of entry *by one under no better right or title*, is sufficient for the maintenance of the action."
>
> 27 *Cyc.* 641-42 b.

It will be borne in mind that the ouster of plaintiff in error by defendant in error was for the purpose—not that they were seeking to make a discovery within the exterior boundary lines of the Parrish No. 2 claim—but to construct a flume line thereover.

> "Possession of a mining claim, without reference to mining rules, is sufficient to main-

tain ejectment as against one entering by no better title. This possession need not be by actual inclosure, but if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries, it is enough, against one entering without title. The regular and usual way of obtaining possession of mining claims is according to the mining regulations of the vicinage, still, a possession not so taken is good against one taking possession the same way; and the actual prior possession of the first occupant would be better than the subsequent possession of the last. No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, to build on it, to cultivate it, or to inclose it. He may be in possession by himself, or by his agents or servants. Going on the lode to work it, or even work done in proximity and in direct relation to the claim for the purpose of extracting or preparing to extract minerals from it, as for example, starting a tunnel a considerable distance off, to run into the claim, would be possession of the claim within the meaning of the rule. Where one enters under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the extent of the whole limits described in the paper, although the possession be only of a part of the claim."

27 *Cyc.* 641-2, note 3.

In our first brief filed in this case we went into the question of the customs of miners in Harris Mining District quite thoroughly, and exten-

sively (pages 108 to 132, inclusive, of brief). We do not conceive of any point raised by the brief of the defendant in respect to the customs in question that has not already been covered by us as above stated. Hence it is unnecessary to burden this Honorable Court with any further argument or citation of cases upon this phase of the case.

We also in our first brief contend that under any circumstances or whatever turn the case may take in this Honorable Court, that we are entitled to the cost in the lower court and costs of the printing on the request of the defendant, of the additional record in this court. We have already pointed out to this Honorable Court just how much of the record we desired to have printed and the additional record which was printed as above stated at the request of the defendant.

In conclusion we respectfully insist that, as we submitted findings to the court below, that were the only findings that there was any evidence to support, that they should have been signed and judgment rendered thereon for plaintiff—in other words, we asked for judgment for plaintiff upon the entire proof submitted—hence the trial court should not only be reversed, but plaintiff should have judgment for the Parrish No. 2 mining claim

and all costs and disbursements in the lower court and for costs in this court.

Respectfully submitted,

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